TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted] 197

JOSEPHINE S. LEWIS, EXECUTRIX OF THE ESTATE OF JAMES LEWIS, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 20, 1894.

(24,349)

(24,849)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 566.

JOSEPHINE B. LEWIS, EXECUTRIX OF THE ESTATE OF JAMES LEWIS, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1915.

a

Court of Claims.

No. 30610.

JAMES LEWIS
vs.
THE UNITED STATES.

I. *Petition and Amended Petitions.*

On the 1st day of April, 1910 the claimant filed his original petition.

Subsequently, to wit: on the 6th day of April 1910, the claimant, by leave of Court, in lieu of said original petition, filed his amended petition.

Subsequently, to wit: on the 31st day of July, 1912, the claimant, by leave of Court, in lieu of said amended petition, filed his second amended petition, which is as follows:

1

Second Amended Petition.

Filed July 31, 1912.

To the Chief Justice and Judges of the Court of Claims of the United States:

The claimant, James Lewis, respectfully represents to the court as follows:

I.

That he is a citizen of the United States and a resident of the city of New Orleans in the State of Louisiana.

II.

That on March 5, 1883, he was designated by the President of the United States to perform the duties of United States Surveyor-General for the District of Louisiana in the place of Jacques A. Gla, who had been suspended from said office by the said President of the
2 United States under authority of Section 1768 of the Revised Statutes of the United States, and on May 1, 1883, he assumed the duties thereof and administered the same continuously thereafter under said designation until January 15, 1884, when, upon the nomination of the President of the United States, confirmed by the Senate of the United States, he was duly appointed to said office under and by authority of Section 2207 of the Revised Statutes of the United States, and on January 21 following was commissioned thereto to date from said January 15, 1884, and, under said appointment, continued in said office until and including January 31, 1886,

when he resigned said office. He was again duly appointed and commissioned to said office on January 19, 1899, and under said second commission he administered said office continuously until January 18, 1905, when he was reappointed and recommissioned to the same office, and under said third commission he administered the duties of said office continuously until July 15, 1909, on which date he yielded the possession and custody of the records and other property of his said office to John H. Batchelor, a clerk detailed from the General Land Office of the United States, in obedience to directions from the Commissioner of the said General Land Office, as hereinafter set forth.

III.

On or about December 7, 1908, claimant received a letter from the Commissioner of the General Land Office of the United States, dated December 5, 1908, in which the said Commissioner informed him that it was proposed to discontinue the office of United States Surveyor General for the District of Louisiana on June 30, 1909,
3 and on or about May 13, 1909, claimant received a letter from the said Commissioner, dated May 11, 1909, the part of which, material in this cause, is in the following words and figures:

"As the office of the Surveyor General of Louisiana will be permanently closed and discontinued on July 1, 1909, the records thereof, excepting such as may be required for use in this office, will be turned over to the State of Louisiana when proper provision has been made by the legislature for their safekeeping and providing for free access to them by the authorities of the United States, as provided by sections 2218, 2220 and 2221, Revised Statutes.

"As no provision has been made by the legislature for the reception of the records under the conditions above stated, it will become necessary to appoint a custodian of them on July 1, at a salary of $1,000 per annum, who will retain them in his custody until the required law has been provided. * * *"

Thereafter, on or about June 19, 1909, claimant received from the said Commissioner a letter in the words and figures following:

"E."
D. B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 17, 1909.

Instructions as to Mr. Batchelor.

U. S. Surveyor General, New Orleans, Louisiana.

SIR: As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that it will be necessary to discontinue it after June 30, next.

4 You are now advised that Mr. John H. Batchelor, of this office, has been detailed to visit your office and supervise the transfer of its records to the State building at Baton Rouge, La.; also to select such of the records and Government property as it is thought best should be moved to this city for use in this office. You are di-

rected to furnish him all facilities for carrying out this purpose and give him such assistance as he may need.

It is assumed that you have already prepared an inventory of the records and property, which will be verified by Mr. Batchelor.

The State authorities having failed to provide by legislation for the custody and care of the records which by law are to be turned over to them, it will be necessary pending the enactment of suitable provision for a place for the records to give the same in charge of a custodian. Mr. Arthur Gascon of your office has been selected for this office, and he will receipt to Mr. Batchelor for the records, by schedule.

Property which is not a part of the records, such as furniture not belonging to the Treasury Department, and stationery, including surveying instruments, drafting instruments, etc., will be examined by Mr. Batchelor, and that which is serviceable and can be transported profitably to this city will be boxed up for transmission. The remainder will be stored and advertised for sale at auction, either under Mr. Gascon or other officer, or turned over to the local Land Office.

Mr. Gascon will be instructed separately.

Very respectfully,

(Signed) FRED DENNETT,
Commissioner.

J. C. P.

Pursuant to the plan outlined in said letter of the said Commissioner to claimant, dated June 17, 1909, on June 19, 1909, John H. Batchelor, a clerk detailed from the General Land Office, acting under instructions from the said Commissioner dated June 17, 1909, arrived at the Surveyor General's Office in New Orleans, Louisiana, and assumed supervision of the closing of that office and the disposition of the records and other property therein, caused inventories of said records and other property to be made, and, on July 15, 1909, the same having been completed, took said records and property out of the possession and custody of the claimant and gave to him a formal receipt therefor. Thereafter, on the same day, to wit, July 15, 1909, the said John H. Batchelor, acting under his said instructions from the said Commissioner, turned over the said records and other property of the office of the Surveyor General for the District of Louisiana to Arthur Gascon, formerly chief clerk in said office, as custodian thereof, said Gascon having been appointed custodian thereof by the Secretary of the Interior of the United States on June 16, 1909, to take effect July 1, 1909.

Notwithstanding that the claimant did not formally yield the possession and custody of the records and other property of said office to the said John H. Batchelor until the 15th day of July, 1909, he received from the United States no salary as Surveyor General aforesaid for any time subsequent to June 30, 1909.

IV.

Sections 2207, 2208, 2217, 2218, 2219, 2220, 2221 and 2222 of the Revised Statutes of the United States are in the following words and figures:

Sec. 2207. There shall be appointed by the President, by and with the advice and consent of the Senate, a surveyor general for the States and Territories herein named, embracing, respectively,
6 one surveying district, namely: Louisiana, Florida, Minnesota, Kansas, California, Nevada, Oregon, Nebraska and Iowa, Dakota, Colorado, New Mexico, Idaho, Washington, Montana, Utah, Wyoming, Arizona.

Sec. 2208. The surveyors general of Louisiana, Florida, Minnesota Kansas, Nebraska and Iowa, and of Dakota Territory shall each receive a salary at the rate of two thousand dollars a year.

Sec. 2217. The commission of every surveyor general now in office, and of every surveyor general hereafter appointed, shall cease and expire, unless sooner vacated by death, resignation, or removal from office, in four years from the date of the commission.

Sec. 2218. The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying districts for which surveyors general have been, or may be appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such districts are completed, the surveyor general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, or to such other officer as may be authorized to receive them, all the field-notes, maps, records and other papers appertaining to land titles within the same; and the office of surveyor general in every such district shall thereafter cease and be discontinued.

Sec. 2219. In all cases where, as provided in the preceding section, the field notes, maps, records and other papers appertaining to land titles in any State are turned over to the authorities of such State, the same authority, powers and duties in relation to the survey, resurvey or subdivision of the lands therein, and all matters and things connected therewith, as previously exercised by the surveyor general, whose district included such State, shall be vested in, and devolved upon, the Commissioner of the General Land Office.

7 Sec. 2220. Under the authority and direction of the Commissioner of the General Land Office any deputy surveyor or other agent of the United States shall have free access to any such field notes, maps, records and other papers, for the purpose of taking extracts therefrom, or making copies thereof, without charge of any kind.

Sec. 2221. The field notes, maps, records and other papers mentioned in section twenty-two hundred and nineteen shall in no case be turned over to the authorities of any State until such State has provided by law for the reception and safe keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United States.

Sec. 2222. Every surveyor general, register and receiver, except where the President sees cause otherwise to determine, is authorized to continue in the uninterrupted discharge of his regular official duties, after the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office; and the existing official bond of any officer so acting shall be deemed good and sufficient, and in force, until the date of the approval of a new bond to be given by him, if recommissioned, or otherwise, for the additional time he may so continue officially to act, pursuant to the authority of this section.

V.

The records of the surveying district of Louisiana were not completed on said 30th day of June, 1909, nor on said 15th day of July, 1909, and the State of Louisiana did not provide by law for the reception and safekeeping as public records of the field notes, maps, records and other papers appertaining to land titles in said
8 State, which belonged to the office of United States Surveyor General of Louisiana, and for the free access to the same of the authorities of the United States, until the 10th day of June, 1910, on which day the Governor of said State approved an act of the General Assembly of said State, known as Act No. 6 of the Session Acts of the General Assembly of the State of Louisiana for the year 1910, and passed for that purpose.

Acting under authority which was vested in him for that purpose by the said Act of the General Assembly of Louisiana, Fred J. Grace, Register of the State Land Office of Louisiana, on June 30, 1910, at 4.30 o'clock P. M., formally receipted to Arthur Gascon, custodian as aforesaid of the records of the United States Surveyor General's Office of Louisiana, for the plats, field notes, books, papers, etc., constituting the records of said office, and at said hour on June 30, 1910, the said Arthur Gascon, custodian, for and in behalf of the United States, formally delivered the said records to the State of Louisiana in the person of its duly authorized representative as aforesaid, the said Fred J. Grace.

Claimant alleges that the acts of the said Commissioner of the General Land Office and the said Secretary of the Interior, in so discontinuing said office of United States Surveyor General for the District of Louisiana before the records of the surveying district of Louisiana were completed, and in requiring him to surrender possession of the records and other property pertaining to his said office as Surveyor General for the District of Louisiana to a person other than the Secretary of State of Louisiana or some other officer designated by the proper State authority to receive them, when claim-
ant had not been suspended from his said office or a successor
9 to him therein duly appointed and commissioned, and in requiring him to so surrender possession of such records and property before the State of Louisiana had provided by law for the reception and safe keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United

States, and in assuming, through an agent, the authority, powers and duties of said office before it had been discontinued in the manner authorized in Section 2218 of the Revised Statutes of the United States, were in violation of said Sections 2218, 2219, 2221 and 2222 of the said Revised Statutes, and unlawfully deprived claimant of his rights as Surveyor General for said district under said sections during the year beginning July 1, 1909, and including and ending on June 30, 1910.

VI.

Although the salary of Surveyor General of Louisiana is and was fixed at two thousand ($2,000) dollars a year by said Section 2208 of the Revised Statutes of the United States, nevertheless, beginning with the Act of March 3, 1877 (19 Stat. at L., 315), making appropriation for the fiscal year ending June 30, 1878, up to and including the Act of May 22, 1908 (35 Stat. at L., 230), making appropriation for the fiscal year ending June 30, 1909, the Congress of the United States appropriated only eighteen hundred ($1,800) dollars yearly for the salary of the incumbent of said office, providing in each annual appropriation thereof during said period that the amount therein appropriated should be received in full compensation for the service of the said fiscal year, and, during all of the time claimant held the said office of United States Surveyor General for the District of Louisiana, he received from the United States salary only at the said rate of eighteen hundred ($1,800) dollars per annum.

The estimates for the public service, under his supervision, of the fiscal year ending June 30, 1910, furnished by the Secretary of the Interior to the Secretary of the Treasury for submission to the Congress of the United States, contained no estimate for the salary of the Surveyor General of Louisiana for said fiscal year, and the Congress of the United States made no appropriation for said salary for said fiscal year. Claimant is advised by counsel and therefore alleges that the omission of Congress to make any appropriation for the salary appertaining to the office of Surveyor General of Louisiana for the said fiscal year ending June 30, 1910, left in full force and effect said Section 2208 of the Revised Statutes of the United States, and that there is now due to the claimant from the defendant, the United States, the sum of two thousand ($2,000) dollars as salary for the period beginning July 1, 1909, to and including June 30, 1910, on which latter day the records, field notes, maps, etc., of his said office were turned over to the State of Louisiana as hereinbefore described.

VII.

Section 1, so far as it is material in this cause, and Section 5 of the Act of Congress approved March 3, 1831 (Stat. at L., 492), entitled, "An Act to create the office of surveyor of the public lands for the State of Louisiana," are in the following words and figures:

"Be it enacted by the Senate and House of Representatives of

the United States of America, in Congress assembled, That a
11 surveyor general for the State of Louisiana shall be appointed, who shall have the same authority, and perform the same duties, respecting the public lands and private land claims in the State of Louisiana, as are now vested in, and required of the surveyor of the lands of the United States, south of the State of Tennessee, or of the principal deputy surveyors in the said State; * * *."

"Sec. 5. And be it further enacted, That the surveyor general to be appointed in pursuance of this act shall establish his office at such place as the President of the United States may deem most expedient for the public service; and that he shall be allowed an annual salary of two thousand dollars, and that he be authorized to employ one skilful draughtsman and recording clerk whose aggregate compensation shall not exceed one thousand five hundred dollars per annum; and that the fees heretofore authorized by law for examining and recording surveys be, and the same are hereby, abolished; and any copy of a plat of survey, or transcript from the records of the office of the said surveyor general, shall be admitted as evidence in any of the courts of the United States or Territories thereof; and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

VIII.

During the entire period of claimant's service as United States Surveyor General for the District of Louisiana, he furnished copies of plats of surveys and transcripts from the records of his said office to various individuals requiring the same, and asked and
12 received therefor from said individuals fees, as compensation for the service rendered in furnishing such copies and transcripts, in amounts equal to or less than those authorized in said Section 5 of the said Act of Congress approved March 3, 1831. Some of said copies and transcripts were certified by the claimant under the seal of his office, and for such certifications he received from the individuals requiring the same fees at the rate of one ($1) dollar for each certificate and seal. From the time claimant assumed the authority, powers and duties of his said office up to and including April 30, 1907, claimant retained as his personal property the fees received by him as hereinabove described, construing said Section 5 of the Act of Congress approved March 3, 1831, as conferring upon him the right to so retain said fees in addition to and separate from the salary received by him under the annual appropriations by Congress for the Surveyor General of Louisiana.

Claimant is informed and believes, and therefore avers, that, from the time of the original establishment of the said office of Surveyor General for the District of Louisiana under said Act of Congress approved March 3, 1831, up to the time he last entered upon the duties thereof, his successive predecessors in said office rendered services to individuals requiring the same, and received therefor from

said individuals fees similar to those described in the last preceding paragraph hereof, and retained said fees as their personal property in the same manner and under the same construction of said Section 5 of the Act of Congress approved March 3, 1831, as alleged for the claimant in the last preceding paragraph hereof.

13 Claimant is informed and believes, and therefore alleges, that, during all of said periods of time up to and including said April 30, 1907, the Commissioner of the General Land Office and the Secretary of the Interior acquiesced in said construction of said Section 5 of said Act of Congress approved March 3, 1831.

IX.

Under date of April 15, 1907, the Commissioner of the General Land Office issued a circular order to claimant requiring him to desist from retaining as his personal property the fees received as compensation for the services in furnishing copies of plats of surveys and transcripts of records above described, and requiring him, when application should be made by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, and to require said applicant to deposit the amount indicated in a U. S. Depository to the credit of the Treasurer of the United States, and directing claimant, after that should have been done, to furnish the copies and transcripts ordered, upon presentation to him by the applicant of a duplicate certificate of his deposit as aforesaid, which duplicate certificates of deposit claimant was required by the said order to forward to the office of the said Commissioner in Washington.

Against this said order the claimant protested to the said Commissioner of the General Land Office in a letter dated May 3, 1907, in which claimant informed the said Commissioner that his office had hitherto based its charges for copies from its records upon

14 Section 5 of the Act of March 3, 1831 (4 Stat. at L., 492), that the rates established by law for registers and receivers for furnishing such copies were not applicable to his office, and that the fees for furnishing such copies, authorized to be charged by said Section 5 of the said Act of March 3, 1831, had been construed by the Surveyor General of Louisiana as perquisites allowed to him, as appeared from the correspondence of his office with the General Land Office, as far back as 1860. To this letter the Commissioner of the General Land Office responded in a letter to claimant, dated May 9, 1907, in which the said Commissioner advised the claimant that the said Act of March 3, 1831, being unrepealed, claimant should continue to charge the fees established under said Act, to the extent of which direction the said circular order of April 15, 1907, stood modified as far as claimant's office was concerned, but that all fees of whatever nature, received from parties desiring copies of the records of claimant's office must be covered into the Treasury, and the practice of personally receiving and converting to claimant's own use moneys paid for "extra work," relating to the business of claim-

ant's office, performed by claimant or his clerks, must be discontinued. Upon receipt of said last mentioned letter, dated May 9, 1907, from the said Commissioner of the General Land Office, claimant addressed a second letter of protest to said Commissioner, dated May 24, 1907, in which he requested said Commissioner to reconsider his order as to said fees, in so far as it precluded claimant from receiving said fees and the usual charge of $1.00 for a certificate as a perquisite to claimant's salary, and in said letter claimant stated to said Commissioner that the records of claimant's office showed that said
15 fees had always been construed by all Surveyors General as a perquisite to their salary, that claimant was firmly of the opinion that the construction placed by all former Surveyors General, as well as himself, upon Section 5 of the said Act of March 3, 1831, was correct, and that the Department had never objected to it. To this second protest of claimant the said Commissioner of the General Land Office responded in a letter, dated May 31, 1907, that his said order of April 15, 1907, was considered to be in the interest of good administration and must be strictly observed. Under said order of April 15, 1907, there was deposited by individuals in the United States Sub-Treasury at New Orleans, to the credit of the Treasurer of the United States, in payment for copies of plats of surveys and transcripts of records in his office furnished by the claimant from May 1, 1907, to June 30, 1909, both inclusive, the sum of $635.65.

On October 19, 1907, the Commissioner of the General Land Office issued to claimant a further circular order relative to said fees, modifying said circular order dated April 15, 1907, and requiring claimant thereafter, when application should be made to him by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, to require said applicant to pay or remit the amount of the cost thereof to him, the claimant, in his official capacity as Surveyor General, and, upon receipt of the amount, to have prepared and furnished the copies so ordered, and to deposit the aggregate amount received for said services at the end of each week to the credit of the Treasurer of the United States on account of "Receipts
16 for Furnishing Copies of Records," and to forward the duplicate certificates of deposit to the office of said Commissioner in Washington. Upon receipt of said circular order of October 19, 1907, claimant addressed a letter to the said Commissioner of the General Land Office, dated November 11, 1907, in which claimant called said Commissioner's attention to the fact that said Commissioner's letter to claimant, dated May 9, 1907, had instructed claimant that, said Act of March 3, 1831, being unrepealed, claimant should continue to charge the fees established thereunder, to which extent said circular order of April 15, 1907, was modified so far as claimant's office was concerned, and claimant informed said Commissioner that in view of this fact claimant considered that said Commissioner's circular order of October 19, 1907, stood modified to the same extent. To this letter of claimant, dated November 11, 1907,

said Commissioner replied in a letter dated November 15, 1907, in which said Commissioner directed claimant to continue to charge the fees established by said Act of March 3, 1831 (4 Stat., 494), for furnishing copies of plats and transcripts from the records of claimant's office. Under said circular order of October 19, 1907, there was deposited by claimant in the United States Sub-Treasury at New Orleans, to the credit of the Treasurer of the United States, between May 1, 1907, and June 30, 1909, both inclusive, the sum of $1,652.15, received by him from individuals for services rendered as heretofore described.

The sums deposited by individuals or by the claimant, as above described, during said period of time extending from May 1, 1907, to June 30, 1909, both inclusive, aggregated the sum of two thousand two hundred and eighty-seven dollars and eighty cents
17 ($2,287.80), no part of which has been received by the claimant from the United States, and all of which he alleges is due him.

X.

No action has been taken by the Congress of the United States or by either house thereof on the claim herein presented; claimant is the sole owner of said claim and the only person interested therein; no assignment or transfer of said claim or of any part thereof or interest therein has been made by claimant; claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; and claimant believes the facts as stated in this petition to be true.

Wherefore the claimant prays judgment against the United States for the sum of four thousand two hundred and eighty-seven dollars and eighty cents ($4,287.80).

JAMES LEWIS, *Claimant.*
By L. RUSSELL ALDEN,
His Attorney.

L. RUSSELL ALDEN,
Attorney of Record.
E. F. COLLADAY,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

I, L. Russell Alden, being first duly sworn, state that I am the attorney for James Lewis, that I have read the foregoing
18 amended petition subscribed by me in his behalf and know the contents thereof, and that the allegations therein made are true to the best of my knowledge and belief.

L. RUSSELL ALDEN.

Subscribed and sworn to before me this 30th day of July, 1912.
[NOTARIAL SEAL.] JOSEPH STEIN,
Notary Public, D. C.

19 II. *Traverse. Filed May* 8, 1914.

In the Court of Claims of the United States, December Term, A. D. 1914.

No. 30610.

JOSEPHINE B. LEWIS, Executrix of the Estate of James Lewis, Deceased,
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

20 III. *History of Proceedings.*

On May 8, 1914, the case was submitted, without argument, by Mr. L. Russell Alden, for the claimant, and Mr. J. Harwood Graves, for the defendants.

On June 1, 1914 the Court filed an order remanding the case to the Trial Calendar for oral argument on all points.

On December 3, 1914 a motion suggesting the death of the claimant, James Lewis, was filed and for leave to substitute Mrs. Josephine B. Lewis, executrix, as claimant, which was allowed by the Court.

21 IV. *Argument and Submission of Case.*

On March 24, 1915 this case came on to be heard. Mr. L. Russell Alden was heard for the claimant; Mr. J. Harwood Graves was heard in opposition, and the case was submitted.

22 V. *Findings of Fact, Conclusion of Law, and Opinion of the Court. Filed April* 19, 1915.

JOSEPHINE B. LEWIS, Executrix of Estate of James Lewis, Deceased,
v.
THE UNITED STATES.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The decedent, James Lewis, was at all times hereinafter mentioned a citizen of the United States and a resident of the city of New Orleans, in the State of Louisiana, and the above-named plaintiff is the duly appointed executrix of his estate.

II.

On March 5, 1883, said decedent was designated by the President of the United States to perform the duties of United States surveyor general for the district of Louisiana in the place of Jacques A. Gla, who had been suspended from said office by the said President of the United States under authority of section 1768 of the Revised Statutes of the United States. On May 1, 1883, he assumed the duties thereof and administered the same continuously thereafter under said designation until January 15, 1884, when, upon the nomination of the President of the United States, confirmed by the Senate of the United States, he was duly appointed to said office under and by authority of section 2207 of the Revised Statutes of the United States, and on January 21 following was commissioned thereto to date from said January 15, 1884, and, under said appointment, continued in said office until and including January 31, 1886, when he resigned said office. He was again duly appointed and commissioned to said office on January 19, 1899, and under said second commission he administered said office continuously until January 18, 1905, when he was reappointed and recommissioned to the same office, and under said third commission he administered the duties of said office continuously until July 15, 1909, on which date he was deprived
23 of the possession and custody of the records and other property of his said office by John H. Batchelor, a clerk detailed from the General Land Office of the United States and acting under directions from the Commissioner of the said General Land Office, as stated in finding number V, set forth hereafter.

III.

On or about December 7, 1908, the decedent received a letter from the Commissioner of the General Land Office of the United States, dated December 5, 1908, in which the said commissioner informed him that it was proposed to discontinue the office of United States surveyor general for the district of Louisiana on June 30, 1909, and on or about May 13, 1909, decedent received a letter from the said commissioner, dated May 11, 1909, the part of which material in this cause is in the following words and figures:

"As the office of the surveyor general of Louisiana will be permanently closed and discontinued on July 1, 1909, the records thereof, excepting such as may be required for use in this office, will be turned over to the State of Louisiana when proper provision has been made

by the legislature for their safe-keeping and providing for free access to them by the authorities of the United States, as provided by sections 2218, 2220, and 2221, Revised Statutes.

"As no provision has been made by the legislature for the reception of the records under the conditions above stated, it will become necessary to appoint a custodian of them on July 1, at a salary of $1,000 per annum, who will retain them in his custody until the required law has been provided * * *."

IV.

On or about June 19, 1909, the decedent received from the said Commissioner of the General Land Office a letter in the words and figures following:

"E. DEPARTMENT OF THE INTERIOR,
"D. B. GENERAL LAND OFFICE.
"WASHINGTON, D. C., June 17, 1909.

Instructions as to Mr. Batchelor.

"U. S. Surveyor General, New Orleans, Louisiana.

"SIR: As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that it will be necessary to discontinue it after June 30 next.

"You are now advised that Mr. John H. Batchelor, of this office, has been detailed to visit your office and supervise the transfer of its records to the State building at Baton Rouge, La.; also to select such of the records and Government property as it is thought best should be moved to this city for use in this office. You are directed to furnish him all facilities for carrying out this purpose and give him such assistance as he may need.

"It is assumed that you have already prepared an inventory of the records and property, which will be verified by Mr. Batchelor.

24 "The State authorities having failed to provide by legislation for the custody and care of the records which by law are to be turned over to them, it will be necessary, pending the enactment of suitable provision for a place for the records, to give the same in charge of a custodian. Mr. Arthur Gascon, of your office, has been selected for this office, and he will receipt to Mr. Batchelor for the records by schedule.

"Property which is not a part of the records, such as furniture not belonging to the Treasury Department, and stationery, including surveying instruments, drafting instruments, etc., will be examined by Mr. Batchelor, and that which is serviceable and can be transported profitably to this city will be boxed up for transmission. The remainder will be stored and advertised for sale at auction, either

under Mr. Gascon or other officer, or turned over to the local land office.

"Mr. Gascon will be instructed separately.

"Very respectfully,

"(Signed) FRED DENNETT,
Commissioner.

"J. C. P."

V.

Pursuant to the plan outlined in said letter of the Commissioner of the General Land Office to decedent, dated June 17, 1909, on June 19, 1909, John H. Batchelor, a clerk detailed from the General Land Office, acting under instructions from the said commissioner, dated June 17, 1909, arrived at the surveyor general's office in New Orleans, La., and assumed supervision of the closing of that office and the disposition of the records and other property therein, caused inventories of said records and other property to be made, and, on July 15, 1909, the same having been completed, took said records and property out of the possession and custody of the decedent and gave to him a formal receipt therefor. Thereafter, on the same day—to wit, July 15, 1909—the said John H. Batchelor, acting under his said instruction from the said commissioner, turned over the said records and other property of the office of the surveyor general for the district of Louisiana to Arthur Gascon, formerly chief clerk in said office, as custodian thereof, said Gascon having been appointed custodian thereof by the Secretary of the Interior of the United States on June 16, 1909, to take effect July 1, 1909, said appointment being in the following language:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, June 16, 1909.

"Arthur Gascon, of Louisiana, is hereby appointed custodian of the documents and records pertaining to the office of the surveyor general of Louisiana upon the discontinuance of that office, at a salary of $1,000 per annum, to take effect upon July 1, 1909.

"Salary payable from the appropriation for completing field notes, etc., of surveys in Minnesota, North Dakota, and Louisiana.

"By transfer from chief clerk, office of surveyor general of Louisiana.

"R. A. BALLINGER, *Secretary.*"

25 On the 9th of January, 1915, the President issued the following order:

"The Secretary of the Interior.

"SIR: The action of the Interior Department in discontinuing the office of the United States surveyor general for the district of Louisiana from and after June 30, 1909, as shown by the letters of the Commissioner of the General Land Office to James Lewis, surveyor general of Louisiana, dated December 5, 1908, and May 11, 1909,

and the appointment by the Secretary of the Interior, under date of June 16, 1909, of Arthur Gascon as custodian of the records of the office of the surveyor general of Louisiana, to take effect July 1, 1909, copies of which letters and appointment are hereto attached, is hereby ratified and confirmed.

"WOODROW WILSON, *President.*"

VI.

The records of the surveying district of Louisiana were not completed on said 30th day of June, 1909, nor on said 15th day of July, 1909, and the State of Louisiana did not provide by law for the reception and safe-keeping as public records of the field notes, maps, records, and other papers appertaining to land titles in said State, which belonged to the office of United States surveyor general of Louisiana, and for the free access to the same of the authorities of the United States, until the 10th day of June, 1910, on which day the governor of said State approved an act of the general assembly of said State, known as act No. 6 of the Session Acts of the General Assembly of the State of Louisiana for the year 1910, and passed for that purpose.

VII.

Acting under authority which was vested in him for that purpose by the said act of the General Assembly of Louisiana, Fred J. Grace, register of the State land office of Louisiana, on June 30, 1910, at 4.30 o'clock p. m., formally receipted to Arthur Gascon, custodian as aforesaid of the records of the United States surveyor general's office of Louisiana, for the plats, field notes, books, papers, etc., constituting the records of said office, and at said hour on June 30, 1910, the said Arthur Gleason, custodian, for and in behalf of the United States, formally delivered the said records to the State of Louisiana in the person of its duly authorized representative as aforesaid, the said Fred J. Grace.

VIII.

For the period beginning July 1, 1909, and ending June 30, 1910, both inclusive, the decedent, James Lewis, received no salary or compensation from the United States as surveyor general of Louisiana.

IX.

During the entire period of decedent's service as United States surveyor general for the district of Louisiana he furnished copies of plats of surveys and transcripts from the records of his said
26 office to various individuals requiring the same, and asked and received therefor from said individuals fees, as compensation for the service rendered in furnishing such copies and transcripts, in amounts equal to or less than those authorized in said section 5 of the act of Congress approved March 3, 1831, entitled "An act to create the office of surveyor of the public lands for the State

of Louisiana." Some of said copies and transcripts were certified by the decedent under the seal of his office, and for such certifications he received from the individuals requiring the same fees at the rate of $1 for each certificate and seal. From the time decedent assumed the authority, powers, and duties of his said office up to and including April 30, 1907, claimant retained as his personal property the fees received by him as hereinabove described, construing said section 5 of said act of Congress approved March 3, 1831, as conferring upon him the right to so retain said fees in addition to and separate from the salary received by him under the annual appropriations by Congress for the surveyor general of Louisiana.

X.

From the time of the original establishment of the said office of surveyor general for the district of Louisiana under said act of Congress approved March 3, 1831, up to the time he last entered upon the duties thereof, James Lewis's successive predecessors in said office rendered services to individuals requiring the same, and received therefor from aid individuals fees similar to those described in the last preceding finding hereof, and retained said fees as their personal property.

XI.

During all of said periods of time mentioned in finding number X, up to and including said April 30, 1907, the Commissioner of the General Land Office and the Secretary of the Interior acquiesced in said construction of said section 5 of said act of Congress approved March 3, 1831.

XII.

Under date of April 15, 1907, the Commissioner of the General Land Office issued a circular order to decedent requiring him to desist from retaining as his personal property, the fees received as compensation for the services in furnishing copies of plats of surveys and transcripts of records above described, and requiring him, when application should be made by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, and to require said applicant to deposit the amount indicated in a United States depository to the credit of the Treasurer of the United States, and directing decedent, after that should have been done, to furnish the copies and transcripts ordered, upon presentation to him by the applicant of a duplicate certificate of his deposit as aforesaid, which duplicate certificates of deposit decedent was required by the said order to forward to the office of the said commissioner in Washington.

27 XIII.

Against this said order of April 15, 1907, decedent protested to the said Commissioner of the General Land Office in a letter dated May

3, 1907, in which he informed the said commissioner that his office had hitherto based its charges for copies from its records upon section 5 of the act of March 3, 1831 (4 Stat. at L., 492); that the rates established by law for registers and receivers for furnishing such copies were not applicable to his office; and that the fees for furnishing such copies, authorized to be charged by said section 5 of the said act of March 3, 1831, had been construed by the surveyor general of Louisiana as perquisites allowed to him, as appeared from the correspondence of his office with the General Land Office as far back as 1860. To this letter the Commissioner of the General Land Office responded in a letter to decedent, dated May 9, 1907, in which the said commissioner advised decedent that the said act of March 3, 1831, being unrepealed, decedent should continue to charge the fees established under said act, to the extent of which direction the said circular order of April 15, 1907, stood modified as far as decedent's office was concerned, but that all fees of whatever nature received from parties desiring copies of the records of decedent's office must be covered into the Treasury, and the practice of personally receiving and converting to decedent's own use moneys paid for "extra work," relating to the business of decedent's office, performed by decedent or his clerks, must be discontinued.

XIV.

Upon receipt of said last-mentioned letter, dated May 9, 1907, from the said Commissioner of the General Land Office, decedent addressed a second letter of protest to said commissioner, dated May 24, 1907, in which he requested said commissioner to reconsider his order as to said fees, in so far as it precluded decedent from receiving said fees and the usual charge of $1 for a certificate as a perquisite to decedent's salary, and in said letter decedent stated to said commissioner that the records of decedent's office showed that said fees had always been construed by all surveyors general as a perquisite to their salary; that decedent was firmly of the opinion that the construction placed by all former surveyors general, as well as himself, upon section 5 of the said act of March 3, 1831, was correct, and that the department had never objected to it. To this second protest of decedent the said Commissioner of the General Land Office responded in a letter, dated May 31, 1907, that his said order of April 15, 1907, was considered to be in the interest of good administration, and must be strictly observed.

XV.

Under said order of April 15, 1907, there was deposited by individuals in the United States subtreasury at New Orleans, to the credit of the Treasurer of the United States, in payment for copies of plats of surveys and transcripts of records in his office furnished by the decedent from May 1, 1907, to June 30, 1909, both inclusive, the sum of $635.65.

28

XVI.

On October 19, 1907, the Commissioner of the General Land Office issued to decedent a further circular order relative to said fees, modifying said circular order, dated April 15, 1907, and requiring decedent thereafter, when application should be made to him by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, to require said applicant to pay or remit the amount of the cost thereof to him, the decedent, in his official capacity as surveyor general, and upon receipt of the amount to have prepared and furnished the copies so ordered, and to deposit the aggregate amount received for said services at the end of each week to the credit of the Treasurer of the United States on account of "Receipts for furnishing copies of records," and to forward the duplicate certificates of deposit to the office of said commissioner in Washington.

Upon receipt of said circular order of October 19, 1907, decedent addressed a letter to the said Commissioner of the General Land Office, dated November 11, 1907, in which decedent called said commissioner's attention to the fact that said commissioner's letter to decedent, dated May 9, 1907, had instructed decedent that said act of March 3, 1831, being unrepealed, decedent should continue to charge the fees established thereunder, to which extent said circular order of April 15, 1907, was modified so far as decedent's office was concerned, and decedent informed said commissioner that in view of this fact decedent considered that said commissioner's circular order of October 19, 1907, stood modified to the same extent. To this letter of decedent, dated November 11, 1907, said commissioner replied in a letter dated November 15, 1907, in which said commissioner directed decedent to continue to charge the fees established by said act of March 3, 1831 (4 Stat., 494), for furnishing copies of plats and transcripts from the records of decedent's office.

XVII.

Under said circular order of October 19, 1907, there was deposited by decedent in the United States Subtreasury at New Orleans, to the credit of the Treasurer of the United States, between May 1, 1907, and June 30, 1909, both inclusive, the sum of $1,652.15, received by him from individuals for services rendered as heretofore described.

XVIII.

The sums deposited by individuals or by the decedent, as above described, during said period of time extending from May 1, 1907, to June 30, 1909, both inclusive, aggregated the sum of $2,287.80, no part of which has been received by the decedent from the United States.

Conclusions of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

29 *Opinion.*

BARNEY, *Judge*, delivered the opinion of the court:

This suit was brought by the plaintiff to recover an unpaid balance of salary and official fees as surveyor general of the State of Louisiana claimed to be due his decedent. These two claims will be considered separately.

I. The decedent served several terms as surveyor general of the State of Louisiana, but the only one necessary to be here considered is an appointment and commission as such which he received on the 19th of January, 1905, and under which he served until May 13, 1909, when he received a letter from the Commissioner of the General Land Office advising him that the office of the surveyor general of Louisiana would be permanently closed and discontinued on July 1, 1909, when the records of the office would be turned over to the State of Louisiana as soon as proper provision should be made by the legislature of that State for their receipt, pursuant to sections 2218, 2220, and 2221 of the Revised Statutes. June 19, 1909, decedent received a communication from said commissioner, under date of June 17, 1909, advising him that Congress had omitted to make an appropriation for the maintenance of his office, in consequence of which a messenger had been detailed to visit his office and supervise the transfer of its records to the State building at Baton Rouge, La., and to select such of the records and Government property as might be considered advisable to remove to Washington. Decedent was directed to render needful assistance to such messenger for this purpose. This communication also stated that, as the State of Louisiana had failed to provide by legislation for the custody of such records, a custodian named had been appointed for that purpose, who would receipt to such messenger for said records. Statements were also made regarding such part of the property in the office, such as stationery, etc., as might be thought advisable to send to Washington or to sell at auction by such custodian.

Pursuant to this communication a messenger from the General Land Office proceeded to the office of said surveyor general in New Orleans, La., caused an inventory to be made of all the records and property therein, and on the 15th day of July, 1909, turned over the same to one Arthur Gascon, who had been appointed as custodian for that purpose by the Secretary of the Interior by an order as follows:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, June 16, 1909.

"Arthur Gascon, of Louisiana, is hereby appointed custodian of the documents and records pertaining to the office of the surveyor

general of Louisiana upon the discontinuance of that office, at a salary of $1,000 per annum, to take effect upon July 1, 1909.

"Salary payable from the appropriation for completing field notes, etc., of surveys in Minnesota, North Dakota, and Louisiana.

"By transfer from chief clerk, office of surveyor general of Louisiana.

"R. A. BALLINGER, *Secretary.*
"F. D."

30 Said Arthur Gascon remained in custody of said records until June 30, 1910, when, the legislature of the State of Louisiana having enacted the legislation necessary to that end, he delivered the same to the duly authorized officer of said State. Decedent performed no duties connected with the office of surveyor general of Louisiana after he was dispossessed of the office as hereinbefore stated, and has been paid no salary since such dispossession.

The plaintiff now claims that he is entitled to recover the salary of the office from July 1, 1909, the date when the office was taken from decedent, to June 30, 1910, or one year. This claim is upon the assumption that said office was not legally vacated before the latter date, on which day the records of the office were turned over to the State of Louisiana. The decedent's commission was for the term of four years from June 18, 1905, but he continued to hold the office after the expiration of his term under section 2222, Revised Statutes, which provides as follows:

"Every surveyor general, * * * except where the President sees cause otherwise to determine, is authorized to continue in the uninterrupted discharge of his regular official duties after the day of the expiration of his commission, and until a new commission is issued to him for the same office, or until the day when his successor enters upon the duties of such office."

It is upon this statute that the claim in this suit is founded.

In this connection it should be noted that section 2218, Revised Statutes, provides that "whenever the surveys and records of any such districts [i. e., surveying districts] are completed, the surveyor general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, or to such officer as may be authorized to receive them, all the field notes, maps, records, and other papers appertaining to land titles within the same; and the office of surveyor general in every such district shall thereafter cease and be discontinued."

Section 2221, Revised Statutes, provides that such field notes, etc., shall not be turned over to the authorities of any State until such State has provided by law for the reception of the same.

The claim in this case is to be determined upon the construction to be given to the foregoing statutes and the effect to be given to the orders issued by the land commissioner and the Secretary of the Interior which appear in the findings, as well as subsequent legislation of Congress which will be hereafter considered.

It is contended by the plaintiff that the office of surveyor general for the State of Louisiana was never lawfully discontinued until

June 30, 1910, on which date the field notes, etc., pertaining to that office were turned over to the officer appointed by the State of Louisiana to receive the same; and that prior to that time decedent was never removed from said office by competent authority. In other words, it is contended that the decedent continued to hold the office of surveyor general of Louisiana until he was removed therefrom by the automatic action of section 2218, Revised Statutes, which provides that when the filed notes, etc., of the surveyor general's office are turned over to the proper authorities of any State "the office of surveyor general in every such district shall thereafter cease and be discontinued."

31 On the other hand, it is contended by the defendants that the order of June 16, 1909, quoted in full in Finding V, in effect terminated the term of office of decedent, and that said order was in law the act of the President; and numerous authorities are cited to sustain that contention. It is also contended by the defendants that like effect should be given to the order of the President of January 9, 1915, also quoted in Finding V.

The legal effect of these orders will be neither discussed nor decided, as we think the office of surveyor general of the State of Louisiana was effectually abolished by Congress by the act of March 4, 1909 (35 Stat., 945, 987). That statute provides as follows:

"To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota, and Louisiana, caused by the discontinuance of the offices of the surveyors general in those States, six thousand five hundred dollars."

The authority of Congress to abolish the office of surveyor general of any State, of course, is not denied, and the only question in this case is whether it can do so by indirection; that its to say, can Congress by recognizing and indorsing such abolition thereby accomplish such a result.

We have received but little help from either of the parties in this suit to the discussion of this question, and in the limited time afforded us for that purpose no direct authority upon the question has been found and recourse must be had to the general rules upon the construction of statutes.

If two inconsistent acts are passed at different times, the last is to be obeyed; and if obedience can not be observed without derogating from the first it is the first which must give way. Every act is made for some purpose, and its operation is not to be impeded by some previous inconsistent enactment. Dwarris on Statutes, 531. It is fundamental in the construction of statutes that the intention of the framers must prevail; and the only serious problem is as to how that intention is to be ascertained. Of course if the language of the statute is clear and unambiguous we are to go no further to ascertain its meaning. Id., 550 et seq.

It is well settled that a subsequent statute which is repugnant to a prior one necessarily repeals the former one, although it does not do so in terms. Sedgwick on Statutes, 104. In the construction of statutes, if possible, effect must be given to every word contained

in it. Hardcastle on Statutes, 41. When jurisdiction is assumed to exist and provision is made as to its mode of exercise, this carries with it by implication jurisdiction of the proceedings so regulated. State v. Miller, 23 Wis., 634. Thus, in the instant case Congress made provision for the expenses incident to the discontinuance of the office of surveyor general for the State of Louisiana, and failed to make any appropriation for its continuance. A recognition and indorsement of the discontinuance of said office could not have been expressed in clearer language.

In addition to this it may well be presumed that Congress knew, as it doubtless did, of all previous correspondence and transactions in connection with this office and enacted this legislation in the light of such knowledge. It says, "caused by the discontinuance of the office of surveyor general in [Louisiana]." That could mean but one thing, and that was that the said office had been discon-
32 tinued on and after a certain date. We think this legislation had the effect of a direct discontinuance of said office.

II. We come now to consider the next item of the plaintiff's claim, which is for fees alleged to have been earned during decedent's incumbency of this office and remaining unpaid. The act of March 3, 1831, 4 Stat., 492, creating the office of surveyor of the public lands for the State of Louisiana, provided as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a surveyor general for the State of Louisiana shall be appointed, who shall have the same authority and perform the same duties respecting the public lands and private land claims in the State of Louisiana as are now vested in and required of the surveyor of the lands of the United States, south of the State of Tennessee, or of the principal deputy surveyors in the said State; * * *"

"Sec. 5. And be it further enacted, That the surveyor general to be appointed in pursuance of this act shall establish his office at such place as the President of the United States may deem most expedient for the public service; and that he shall be allowed an annual salary of two thousand dollars, and that he be authorized to employ one skillful draughtsman and recording clerk whose aggregate compensation shall not exceed one thousand five hundred dollars per annum; and that the fees heretofore authorized by law for examining and recording surveys be, and the same are hereby, abolished; and any copy of a plat of survey, or transcript from the records of the office of the said surveyor general, shall be admitted as evidence in any of the courts of the United States or Territories thereof; and for every copy of a plat of survey there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

It will be seen that the statute quoted provides an annual salary of $2,000 for the surveyor general of Louisiana, abolishes fees for examining and recording surveys, and provides for certain other fees to be paid, with no provision as to their disposition. Since July 1, 1878, Congress has only appropriated $1,800 per year for such salary

"in full compensation, etc.," so that since the latter date the annual salary has been but $1,800.

It appears that prior to May 1, 1907, the surveyor general of Louisiana made no report of any such fees collected by him, but since that time he has been required to deposit the same to the credit of the United States Treasury. It is now contended by the plaintiff that these fees were a part of the emoluments of this office.

Section 1765, Revised Statutes, is as follows:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Considerable stress is placed by the plaintiff upon the fact that prior to the act of March 3, 1831, establishing the office of surveyor general of the State of Louisiana, and when the jurisdiction
33 of that officer covered a much larger territory, he was allowed certain fees as a part of his compensation. We believe, that we are only to look to the act of March 3, 1831, to determine that question, because that was the law, and the only law, providing for his compensation after that date. In this connection it should also be noted that the act of March 3, 1803, making certain regulations for the then vast territory of Louisiana, among other things provided for a surveyor for the same at an annual salary of $1,500 (sections 10, 13), and made no provision for any fees for him. While the act of April 21, 1806 (2 Stat., 391), making further regulations for the same territory and making provision for deputy surveyors therein and their compensation, provided for the same in the following language: "And each of the said principal deputies shall receive an annual compensation of five hundred dollars, and in addition thereto the following fees, etc." (Sec. 9.)

The language of section 1765, Revised Statutes, is too plain for misunderstanding and has always been interpreted according to its letter. King v. United States, 147 U. S., 676; Woodwell v. United States, 214 U. S., 82; 41 C. Cls., 357.

We see no application of the Weeks case (unreported) to the suit at bar. The statute there under consideration provided in terms "that the register shall be entitled to a fee, etc." We think that in this case it would require a strained and entirely unauthorized construction, indeed, to hold that the decedent was entitled under the act of March 3, 1831, supra, to retain the fees therein provided for.

It follows from the foregoing that the petition must be dismissed.

All concur.

34 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 19th day of April, 1915, judgment was ordered to be entered as follows:

The Court on due consideration of the premises, find for the de-

fendant and do order, adjudge and decree that the petition of the claimant, Josephine B. Lewis, executrix of the estate of James Lewis, deceased, be, and the same is hereby dismissed.

BY THE COURT.

35 VII. *Application for, and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the 19th day of April 1915 in favor of defendants, the claimant, by L. Russell Alden, her attorney of record, on the 14th day of July 1915, makes application for and gives notice of an appeal to the Supreme Court of the United States.

L. RUSSELL ALDEN
Attorney for Claimant.
E. F. COLLADAY,
Of Counsel.

Filed July 14, 1915.
Allowed, July 15, 1915.
EDWARD K. CAMPBELL,
Chief Justice.

36 Court of Claims.

No. 30610.

JOSEPHINE B. LEWIS, EXIX. of the Estate of James Lewis, Deceased,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the history of proceedings; of the findings of fact and conclusion of law; of the opinion of the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 17th day of July, A. D., 1915.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,849. Court of Claims. Term No. 566. Josephine B. Lewis, Executrix of the estate of James Lewis, deceased, appellant, vs. The United States. Filed July 19th, 1915. File No. 24,849.

FILED
DEC 30 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

JOSEPHINE B. LEWIS, EXECUTRIX OF THE ESTATE OF JAMES LEWIS, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

No. 197.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

L. RUSSELL ALDEN,
EDWARD F. COLLADAY,
Counsel for Appellant,
Union Trust Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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First Point:
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

JOSEPHINE B. LEWIS, EXECUTRIX OF THE ESTATE OF JAMES LEWIS, DECEASED, APPELLANT,
vs.
THE UNITED STATES.
No. 197.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

I. STATEMENT OF THE CASE.

Proceedings and Judgment.

This suit was instituted by James Lewis, since deceased, to recover the sum of $2,000 salary claimed to be due from the United States to him as Surveyor General of Louisiana for the fiscal year beginning July 1, 1909, and ending June 30, 1910, and to recover the

further sum of $2,287.80 fees claimed to belong to him as perquisites of his said office of Surveyor General of Louisiana and paid over his protest into the Treasury of the United States between May 1, 1907, and June 30, 1909, both inclusive, at the direction of his superior officer, the Commissioner of the General Land Office, a total of $4,287.80 for which he prayed judgment.

The Court of Claims found for the defendant, the United States, on both items and dismissed claimant's petition, from which judgment claimant appeals. The decision of the Court of Claims is reported in 50 Court of Claims Reports 226.

The Facts.

1. On January 18, 1905, James Lewis, who had previously served several terms in the office and was then its incumbent, was reappointed and recommissioned Surveyor General of Louisiana by the President of the United States, by and with the advice and consent of the Senate. (Rec., p. 12.) The authority for this appointment is found in Section 2207 of the Revised Statutes of the United States, which reads as follows:

> "Sec. 2207. There shall be appointed by the President, by and with the advice and consent of the Senate, a surveyor general for the States and Territories herein named, embracing, respectively, one surveying district, namely: Louisiana, Florida, Minnesota, Kansas, California, Nevada, Oregon, Nebraska and Iowa, Dakota, Colorado, New Mexico, Idaho, Washington, Montana, Utah, Wyoming, Arizona."

Under this reappointment and commission, James Lewis continued in said office of Surveyor General of

Louisiana for four years, as provided in Section 2217 of the Revised Statutes, and thereafter, as authorized by Section 2222 of the Revised Statutes. (Rec., p. 20). These two sections read as follows:

> "Sec. 2217. The commission of every surveyor general now in office, and of every surveyor general hereafter appointed, shall cease and expire, unless sooner vacated by death, resignation, or removal from office, in four years from the date of the commission.
>
> "Sec. 2222. Every surveyor general, register and receiver, except where the President sees cause otherwise to determine, is authorized to continue in the uninterrupted discharge of his regular official duties, after the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office; and the existing official bond of any officer so acting shall be deemed good and sufficient, and in force, until the date of the approval of a new bond to be given by him, if recommissioned, or otherwise, for the additional time he may so continue officially to act, pursuant to the authority of this section."

On December 5, 1908, the Commissioner of the General Land Office wrote to James Lewis a letter, in which said Commissioner stated that it was proposed to discontinue the office of Surveyor General of Louisiana on June 30, 1909, and on May 11, 1909, said Commissioner of the General Land Office wrote to James Lewis another letter, of which the following part is material to this cause:

> "As the office of the surveyor general of Louisiana will be permanently closed and discontinued on July 1, 1909, the records thereof, excepting such

as may be required for use in this office, will be turned over to the State of Louisiana when proper provision has been made by the legislature for their safe-keeping and providing for free access to them by the authorities of the United States, as provided by sections 2218, 2220, and 2221, Revised Statutes.

"As no provision has been made by the legislature for the reception of the records under the conditions above stated, it will become necessary to appoint a custodian of them on July 1, at a salary of $1,000 per annum, who will retain them in his custody until the required law has been provided. . . ." (Rec., pp. 12-13.)

On June 17, 1909, said Commissioner of the General Land Office wrote to James Lewis a further letter, wherein he informed him that

> "As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that it will be necessary to discontinue it after June 30 next."

In this letter said Commissioner also informed James Lewis that John H. Batchelor, of said Commissioner's office, had been detailed to visit James Lewis' office and supervise the transfer of its records to the State building at Baton Rouge, Louisiana, and of such of its property as might be suitable for use to said Commissioner's office in Washington, and said Commissioner directed James Lewis "to furnish him (Batchelor) all facilities for carrying out this purpose and give him such assistance as he may need." This letter also contained the following statement by said Commissioner:

"The State authorities having failed to provide by legislation for the custody and care of the records which by law are to be turned over to them, it will be necessary, pending the enactment of suitable provision for a place for the records, to give the same in charge of a custodian. Mr. Arthur Gascon, of your office, has been selected for this office, and he will receipt to Mr. Batchelor for the records by schedule." (Rec., pp. 13-14).

The estimates for the public service, under his supervision, of the fiscal year ending June 30, 1910, furnished by the Secretary of the Interior to the Secretary of the Treasury for submission to the Congress of the United States, contained no estimate for the salary of the Surveyor General of Louisiana for said fiscal year and the Congress of the United States made no appropriation for said salary for said fiscal year. (Rec., p. 6.) The Sundry Civil Appropriation Act, approved March 4, 1909, contained the following provision (35 Stat. 945 at 987, bottom of page):

"To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota, and Louisiana, caused by the discontinuance of the offices of the surveyors-general in those States, six thousand five hundred dollars."

Pursuant to the plan outlined in said letter of said Commissioner to James Lewis, dated June 17, 1909, on June 19, 1909, John H. Batchelor, the detailed clerk from the General Land Office mentioned in said letter, acting under instructions from the said Commissioner, dated June 17, 1909, arrived at the Surveyor General's Office in New Orleans, Louisiana, and assumed supervision of the closing of that office and the disposition

of the records and other property therein, caused inventories of said records and other property to be made, and, on July 15, 1909, the same having been completed, took said records and property out of the possession and custody of James Lewis and gave to him a formal receipt therefor. Thereafter, on the same day, July 15, 1909, said John H. Batchelor, acting under his said instructions from the said Commissioner, turned over the said records and other property of the office of the Surveyor General for the District of Louisiana to Arthur Gascon, formerly chief clerk in said office, as custodian thereof, said Gascon having been appointed custodian thereof by the Secretary of the Interior of the United States on June 16, 1909, to take effect July 1, 1909, which appointment was in the following language:

> "Department of the Interior,
> "Washington, June 16, 1909.
>
> "Arthur Gascon, of Louisiana, is hereby appointed custodian of the documents and records pertaining to the office of the surveyor general of Louisiana upon the discontinuance of that office, at a salary of $1,000 per annum, to take effect upon July 1, 1909.
>
> "Salary payable from the appropriation for completing field notes, etc., of surveys in Minnesota, North Dakota, and Louisiana.
>
> "By transfer from chief clerk, office of surveyor general of Louisiana.
>
> "R. A. Ballinger, Secretary."

On the 9th of January, 1915, the President issued the following order:

> "The Secretary of the Interior.
>
> "Sir: The action of the Interior Department

in discontinuing the office of the United States surveyor general for the district of Louisiana from and after June 30, 1909, as shown by the letters of the Commissioner of the General Land Office to James Lewis, surveyor general of Louisiana, dated December 5, 1908, and May 11, 1909, and the appointment by the Secretary of the Interior, under date of June 16, 1909, of Arthur Gascon as custodian of the records of the office of the surveyor general of Louisiana, to take effect July 1, 1909, copies of which letters and appointment are hereto attached, is hereby ratified and confirmed.

"WOODROW WILSON, President."

(Rec., pp. 14-15.)

The records of the surveying district of Louisiana were not completed on the 30th day of June, 1909, nor on the 15th day of July, 1909, and the State of Louisiana did not provide by law for the reception and safekeeping as public records of the field notes, maps, records, and other papers appertaining to land titles in said State, which belonged to the office of United States Surveyor General of Louisiana, and for the free access to the same of the authorities of the United States, until the 10th day of June, 1910, on which day the Governor of said State approved an act of the General Assembly of said State, known as Act No. 6 of the Session Acts of the General Assembly of the State of Louisiana for the year 1910, and passed for that purpose. (Rec., p. 15.)

Acting under authority which was vested in him for that purpose by the said act of the General Assembly of Louisiana, Fred J. Grace, register of the State Land Office of Louisiana, on June 30, 1910, at 4:30 o'clock p. m., formally receipted to Arthur Gascon, custodian as aforesaid of the records of the United States Surveyor General's office of Louisiana, for the plats, field

notes, books, papers, etc., constituting the records of said office, and at said hour on June 30, 1910, the said Arthur Gascon, custodian, for and in behalf of the United States, formally delivered the said records to the State of Louisiana in the person of its duly authorized representative as aforesaid, the said Fred J. Grace. (Rec., p. 15.)

For the period beginning July 1, 1909, and ending June 30, 1910, both inclusive, the decedent, James Lewis, received no salary or compensation from the United States as Surveyor General of Louisiana. (Rec., p. 15.)

Section 2208 of the Revised Statutes of the United States reads as follows:

> "Sec. 2208. The surveyors general of Louisiana, Florida, Minnesota, Kansas, Nebraska and Iowa, and of Dakota Territory shall each receive a salary at the rate of two thousand dollars a year."

Beginning, however, with the Act of March 3, 1877 (19 Stat. 315), making appropriation for the fiscal year ending June 30, 1878, up to and including the Act of May 22, 1908 (35 Stat. 230), making appropriation for the fiscal year ending June 30, 1909, the Congress of the United States appropriated only eighteen hundred ($1,800) dollars yearly for the salary of the Surveyor General of Louisiana, providing in each annual appropriation thereof during said period that the amount therein appropriated should be received in full compensation for the service of the said fiscal year, and, during all of the time James Lewis held the office of United States Surveyor General for the District of Louisiana, he received from the United States salary only at the rate of eighteen hundred ($1,800) dollars per annum. (Rec., p. 6.)

Sections 2218, 2219 and 2221 of the Revised Statutes read as follows:

"Sec. 2218. The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying districts for which surveyors general have been, or may be appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such districts are completed, the surveyor general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, or to such other officer as may be authorized to receive them, all the field-notes, maps, records and other papers appertaining to land titles within the same; and the office of surveyor general in every such district shall thereafter cease and be discontinued.

"Sec. 2219. In all cases where, as provided in the preceding section, the field notes, maps, records and other papers appertaining to land titles in any State are turned over to the authorities of such State, the same authority, powers and duties in relation to the survey, resurvey or subdivision of the lands therein, and all matters and things connected therewith, as previously exercised by the surveyor general, whose district included such State, shall be vested in, and devolved upon, the Commissioner of the General Land Office.

"Sec. 2221. The field notes, maps, records and other papers mentioned in section twenty-two hundred and nineteen shall in no case be turned over to the authorities of any State until such State has provided by law for the reception and safe keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United States."

2. During the entire period of James Lewis' service as Surveyor General of Louisiana he furnished copies of plats of surveys and transcripts from the records of his office to various individuals requiring the same and asked and received therefor from these individuals fees, as compensation for the service rendered in furnishing such copies and transcripts, in amounts equal to or less than those authorized in Section 5 of the Act of Congress approved March 3, 1831, entitled "An act to create the office of surveyor of the public lands for the State of Louisiana." Section 1, so far as it is material in this cause, and Section 5 of said Act of Congress approved March 3, 1831 (4 Stat. 492), read as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That a surveyor general for the State of Louisiana shall be appointed, who shall have the same authority, and perform the same duties, respecting the public lands and private land claims in the State of Louisiana, as are now vested in, and required of the surveyor of the lands of the United States, south of the State of Tennessee, or of the principal deputy surveyors in the said State; . . .
>
> "Sec. 5. And be it further enacted, That the surveyor general to be appointed in pursuance of this act shall establish his office at such place as the President of the United States may deem most expedient for the public service; and that he shall be allowed an annual salary of two thousand dollars, and that he be authorized to employ one skilful draughtsman and recording clerk whose aggregate compensation shall not exceed one thousand five hundred dollars per annum; and that the fees heretofore authorized by law for examining

> and recording surveys be, and the same are hereby, abolished; and any copy of a plat of survey, or transcript from the records of the office of the said surveyor general, shall be admitted as evidence in any of the courts of the United States or Territories thereof; and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

Some of these copies and transcripts were certified by James Lewis under the seal of his office, and for such certifications he received from the individuals requiring the same fees at the rate of $1 for each certificate and seal. From the time James Lewis assumed the authority, powers, and duties of his office up to and including April 30, 1907, he retained as his personal property the fees received by him as hereinabove described, construing said section 5 of said Act of Congress approved March 3, 1831, as conferring upon him the right to so retain said fees in addition to and separate from the salary received by him under the annual appropriations by Congress for the Surveyor General of Louisiana. (Rec., pp. 15-16.)

From the time of the original establishment of the office of Surveyor General for the District of Louisiana under said Act of Congress approved March 3, 1831, up to the time he last entered upon the duties thereof, James Lewis's successive predecessors in said office rendered services to individuals requiring the same, and received therefor from said individuals fees, similar to those described in the last preceding paragraph hereof, and retained said fees as their personal property, and during all of said periods of time up to and

including said April 30, 1907, the Commissioner of the General Land Office and the Secretary of the Interior acquiesced in the construction of said section 5 of said Act of Congress approved March 3, 1831, therein set forth. (Rec., p. 16.)

Under date of April 15, 1907, the Commissioner of the General Land Office issued a circular order to James Lewis requiring him to desist from retaining as his personal property the fees received as compensation for the services in furnishing copies of plats of surveys and transcripts of records above described, and requiring him, when application should be made by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, and to require said applicant to deposit the amount indicated in a United States depository to the credit of the Treasurer of the United States, and directing him, James Lewis, after that should have been done, to furnish the copies and transcripts ordered, upon presentation to him by the applicant of a duplicate certificate of his deposit as aforesaid, which duplicate certificates of deposit James Lewis was required by the said order to forward to the office of the said Commissioner in Washington. (Rec., p. 16.)

Against this order of April 15, 1907, James Lewis protested to the Commissioner of the General Land Office in a letter dated May 3, 1907, in which he informed the said Commissioner that his office had hitherto based its charges for copies from its records upon section 5 of the Act of March 3, 1831 (4 Stat. 492); that the rates established by law for registers and receivers for furnishing such copies were not ap-

plicable to his office; and that the fees for furnishing such copies, authorized to be charged by said section 5 of the said Act of March 3, 1831, had been construed by the Surveyor General of Louisiana as perquisites allowed to him, as appeared from the correspondence of his office with the General Land Office as far back as 1860. To this letter the Commissioner of the General Land Office responded in a letter to James Lewis, dated May 9, 1907, in which the said Commissioner advised James Lewis that the said Act of March 3, 1831, being unrepealed, he should continue to charge the fees established under said act, to the extent of which direction the said circular order of April 15, 1907, stood modified as far as his, James Lewis's office was concerned, but that all fees of whatever nature received from parties desiring copies of the records of James Lewis's office must be covered into the Treasury, and the practice of personally receiving and converting to his own use moneys paid for "extra work," relating to the business of James Lewis's office, performed by James Lewis or his clerks, must be discontinued. (Rec., pp. 16-17.)

Upon receipt of this last-mentioned letter, dated May 9, 1907, from the said Commissioner of the General Land Office, James Lewis addressed a second letter of protest to said Commissioner, dated May 24, 1907, in which he requested said Commissioner to reconsider his order as to said fees, in so far as it precluded him, James Lewis, from receiving said fees and the usual charge of $1 for a certificate as a perquisite to his salary, and in this second letter of protest James Lewis stated to said Commissioner that the records of his, James Lewis's, office showed that said fees had always been construed by all Surveyors

General as perquisites to their salary; that James Lewis was firmly of the opinion that the construction placed by all former Surveyors General, as well as himself, upon section 5 of the said Act of March 3, 1831, was correct, and that the Department had never objected to it. To this second protest of James Lewis the said Commissioner of the General Land Office responded, in a letter dated May 31, 1907, that his order of April 15, 1907, was considered to be in the interest of good administration, and must be strictly observed. (Rec., p. 17.)

Under the Commissioner's order of April 15, 1907, there was deposited by individuals in the United States Subtreasury at New Orleans, to the credit of the Treasurer of the United States, in payment for copies of plats of surveys and transcripts of records in his office furnished by James Lewis from May 1, 1907, to June 30, 1909, both inclusive, the sum of $635.65. (Rec., p. 17.)

On October 19, 1907, the Commissioner of the General Land Office issued to James Lewis a further circular order relative to said fees, modifying said circular order, dated April 15, 1907, and requiring James Lewis thereafter, when application should be made to him by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates established by law for registers and receivers for like services, to require said applicant to pay or remit the amount of the cost thereof to him, James Lewis, in his official capacity as Surveyor General, and, upon receipt of the amount, to have prepared and furnished the copies so ordered and to deposit the aggregate amount received for said services at the end

of each week to the credit of the Treasurer of the United States on account of "Receipts for furnishing copies of records," and to forward the duplicate certificates of deposit to the office of said Commissioner in Washington. (Rec., p. 18.)

Upon receipt of this circular order of October 19, 1907, James Lewis addressed a letter to the said Commissioner of the General Land Office, dated November 11, 1907, in which he called the Commissioner's attention to the fact that the Commissioner's letter to him, dated May 9, 1907, had instructed him that said Act of March 3, 1831, being unrepealed, he, James Lewis, should continue to charge the fees established thereander, to which extent said circular order of April 15, 1907, was modified so far as James Lewis's office was concerned, and James Lewis informed said Commissioner that, in view of this fact, he considered that said Commissioner's circular order of October 19, 1907, stood modified to the same extent. To this letter of James Lewis, dated November 11, 1907, said Commissioner replied in a letter dated November 15, 1907, in which he directed James Lewis to continue to charge the fees established by said Act of March 3, 1831 (4 Stat. 494), for furnishing copies of plats and transcripts from the records of his, James Lewis's, office. (Rec., p. 18.)

Under said circular order of October 19, 1907, there was deposited by James Lewis in the United States Subtreasury at New Orleans, to the credit of the Treasurer of the United States, between May 1, 1907, and June 30, 1909, both inclusive, the sum of $1,652.15, received by him from individuals for services rendered as heretofore described. (Rec., p. 18.)

The sums deposited by individuals or by James

Lewis, as above described, during said period of time extending from May 1, 1907, to June 30, 1909, both inclusive, aggregated the sum of $2,287.80, no part of which has been received by James Lewis or his estate from the United States. (Rec., p. 18.)

Section 1765 of the Revised Statutes of the United States reads as follows:

> "Sec. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

II. ASSIGNMENTS OF ERROR.

Appellant hereby assigns the following errors in the judgment and opinion of the Court of Claims:

1. The failure to render judgment for the claimant for $2,000, salary of James Lewis as Surveyor General of Louisiana for the year beginning July 1, 1909, and ending June 30, 1910, both inclusive, upon the facts set forth in Findings numbered I to VIII, both inclusive. (Rec., pp. 12-15.)

2. The failure to render judgment for the claimant for $2,287.80 fees, paid into the United States Treasury over James Lewis's protest, as perquisites of the office of Surveyor General of Louisiana then held by said James Lewis, upon the facts set forth in Findings numbered IX to XVIII, both inclusive. (Rec., pp. 15-18.)

III. BRIEF OF ARGUMENT.

1. Salary.

APPELLANT'S CONTENTION.

It is the contention of appellant that the office of Surveyor General of Louisiana did not cease until its records were turned over to the State of Louisiana on June 30, 1910, that James Lewis remained the Surveyor General of Louisiana until that office actually ceased, that the action of the Commissioner of the General Land Office and the Secretary of the Interior in preventing him from exercising its prerogatives and performing its duties after June 30, 1909, as above set forth, was illegal, and that, as the rightful incumbent of the office at the time, he was, and appellant, his executrix is, entitled to the statutory salary, attached thereto, for the fiscal year beginning July 1, 1909, and ending June 30, 1910, the period extending from the time he was deprived by the Commissioner of the General Land Office and the Secretary of the Interior of the possession and control of the records and other property of said office up to the time when the custodian thereof, appointed by the Secretary of the Interior, turned said records and property over to the State of Louisiana.

THE COURT OF CLAIMS' DECISION.

The Court of Claims held, in its opinion rendered by Barney, Judge, that the office of Surveyor General of Louisiana was abolished by the Act of Congress of March 4, 1909 (35 Stat. 945, 987) wherein it provided:

> "To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota and Louisiana, caused by the discontinuance of the offices of the surveyors general in those States, six thousand five hundred dollars." (Rec., p. 21.)

The decision of the Court of Claims, therefore, amounts to this, that the parenthetical phrase "*caused by the discontinuance of the offices of the surveyors general in those States*", found in the above-quoted item from the Sundry Civil Appropriation Act of March 4, 1909, repealed so much of Section 2207 of the Revised Statutes of the United States as established the office of Surveyor General of Louisiana.

APPELLANT'S FIRST POINT ON SALARY.

The office of Surveyor General of Louisiana was created and established by permanent statute and was not dependent on appropriation therefor.

Statutory authority for the existence of some public offices is found only in the annual appropriations of the Congress for the maintenance thereof. Such offices, from the very nature of their creation, expire or continue with the lapsing or renewal of the appropriations upon which they rest. The office of Surveyor General of Louisiana was not of this character. Originally created by express enactment in Section 1 of the Act of Congress approved March 3, 1831, entitled "An Act to create the office of surveyor of the public lands for the State of Louisiana" (4 Stat. 492, Rec., p. 6-7), the authority for its existence was confirmed by Section 2207 of the Revised Statutes, which provides that the President by and with the advice and consent

of the Senate shall appoint a Surveyor General of Louisiana, and the salary which it carried was likewise fixed by statute (R. S. 2208). The office was not in any sense the creature of appropriation, having an existence dependent upon the life of such appropriation. It was an office that existed whether Congress made any appropriation for it or not. The omission, therefore, of Congress to appropriate for its maintenance during the fiscal year ending June 30, 1910, could not, in itself, have any other effect than that of inconveniencing its incumbent by withholding his salary for that period, and compelling him, as it did, to sue for it in the Court of Claims.

APPELLANT'S SECOND POINT ON SALARY.

The office of Surveyor General of Louisiana could be abolished only by an act of Congress.

The office of Surveyor General of Louisiana, having been thus established by statute law as a permanently existing office, could be abolished only by act of Congress. The President of the United States himself could not abolish it by executive order or proclamation. Still less could the Secretary of the Interior or the Commissioner of the General Land Office abolish it in the manner attempted by them as above set forth.

APPELLANT'S THIRD POINT ON SALARY.

The act of Congress abolishing the office must be general or special.

If the office of Surveyor General of Louisiana could be abolished only by act of Congress, that act must be a general act, providing for the automatic abolition of

the office under prescribed circumstances, or else it must be a special act.

APPELLANT'S FOURTH POINT ON SALARY.

Congress passed no special act abolishing the office.

The decision of the Court of Claims in this case is based on the holding that the following item in the sundry civil appropriation act of March 4, 1909 (35 Stat. 945, 987):

> "To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota and Louisiana, caused by the discontinuance of the offices of the surveyors general in those States, six thousand five hundred dollars."

was in effect a special act abolishing this office. (Rec., p. 21.) This holding appellant believes to be erroneous for the following reasons.

The item in the sundry civil appropriation act of March 4, 1909, does not in express terms declare the office of Surveyor General of Louisiana to be abolished or discontinued. If it is at all a repeal of Section 2207 of the Revised Statutes, so far as that section establishes the office of Surveyor General of Louisiana, it is an implied repeal. This is admitted in the opinion of the Court below (Rec., p. 21). But implied repeals "are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both * * * ." *Washington* v. *Miller*, 235 U. S. 428; Moore on Statutes and Statutory Con-

struction in Federal Statutes Annotated, Second Edition (1916), Vol. 1, p. 158 and cases there cited. There is no such conflict here. The recital "caused by the discontinuance of the offices of the surveyors general in those states," the effect of which is in question, neither states nor intimates any time at which the discontinuance had taken place or was to take place. In its wording it is as applicable and on a reasonable interpretation it is more applicable to a coming discontinuance than to one immediately passed. The item in which the recital is contained is an item appropriating money to *complete unfinished work of the offices in question* and the most logical presumption of whatever legislative intent is to be inferred from its language is that *the offices were to be discontinued only when the work for which they were created was completed* and then, not in an unusual and illegal manner, but in one of the two usual and legal manners known to Congress—discontinuance under the terms of Sections 2218, 2219 and 2221 of the Revised Statutes, in accordance with which appellant contends it was discontinued, but on June 30, 1910, instead of June 30, 1909, or discontinuance by declaratory act providing therefor, in the manner in which Congress had previously abolished the office of Surveyor General of other states, as will be hereinafter shown. And it must not be forgotten that this recital, "caused by the discontinuance of the offices of the surveyors general in those states" is, after all is said, nothing but a recital. It is not a declaration, not an enactment, but simply a recital. Counsel have been able to discover in all the reports but two cases dealing with the effect of recitals in public acts, *United States* v. *Jordan*, 113 U. S. 418 and *Kinkead* v. *United States*, 150 U. S. 499,

and neither of these are precisely in point in this case. So far, however, as they bear upon the question here at issue they sustain appellant's contention. In the latter of these two cases, *Kinkead* v. *United States*, this Court held that the Court of Claims was not estopped to inquire into the validity of the title of the Russian-American Company to a certain building by the recital, in the preamble of an act referring a case to it for adjudication, "Whereas John H. Kinkead * * * did * * * purchase a certain building * * * from the Russian-American Company, *the owner of said building;* * * * ." In the former of the two cases, *United States* v. *Jordan*, this Court held that, in an appropriation act directing the Secretary of the Treasury to pay to certain named persons certain specified amounts of taxes collected from them "contrary to the provisions of the regulations issued by the Secretary of the Treasury" etc., the recital "*contrary to the provisions of the regulations issued by the Secretary of the Treasury*" indicated no legislative intention to submit to anyone the determination of the question whether the taxes, directed to be refunded, were collected contrary to the provisions cited. The statement of Mr. Justice Brown, distinguishing these two cases in the course of delivering this Court's opinion in the *Kinkead* case, is well worth considering in its bearing on the case at bar:

> "It needs no argument to show that there is wide distinction between an act directing a particular thing to be done, and an act reciting the existence of a certain fact which had long been a matter of dispute, and which the Court of Claims was authorized by the act to pass upon and determine." (150 U. S. 483, 498.)

And there may also be added his statement on the previous page of the report:

> "It is well settled, however, that a mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case." (150 U. S. 483, 497.)

Surely, in view of the above, the Court of Claims erred in the case at bar in holding that, in the item in the Sundry Civil Appropriation Act of March 4, 1909, appropriating sixty-five hundred dollars to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota and Louisiana, the indefinite recital "*caused by the discontinuance of the offices of the surveyors general in those states*" effectually abolished the office of Surveyor General of Louisiana, that is, repealed so much of Section 2207 of the Revised Statutes of the United States as established that office.

A comparison, with previous legislation of Congress abolishing the offices of other surveyors general, of the legislation contained in this item in the Sundry Civil Appropriation Act of March 4, 1909, in question, (35 Stat. 945, 987), also shows that, on a right construction, the item cannot be given the effect attributed to it by the decision of the Court of Claims in this case. When Congress desired to abolish the office of Surveyor General of Kansas, it provided, in the Sundry Civil Appropriation Act approved July 31, 1876 (19 Stat. 121), that

> "the office of the surveyor general of Kansas is hereby abolished from and after the thirtieth of September next."

When Congress wished to abolish the office of Surveyor General for the District of Nebraska and Iowa, it provided, in the Sundry Civil Appropriation Act approved October 2, 1888 (25 Stat. 525), that

> "the office of surveyor-general for the District of Nebraska and Iowa is hereby abolished."

There is no indirection in these provisions. The intent of Congress is spoken right out; it is clear and distinct. Moreover, that Congress knows how to say what it means and does not mean any more than it says is shown most forcibly by the passage *on July 31, 1876*, of the act above mentioned abolishing the Kansas office, despite the fact that the Legislative, Executive and Judicial Appropriation Act, approved March 3, 1875 (18 Stat. 366), provided:

> "For the surveyor-general of Kansas, two thousand dollars, and for the clerks in his office, six thousand three hundred dollars, and the business of the said office shall be settled, and the office shall be closed and discontinued, *on or before the thirtieth day of June, eighteen hundred and seventy-six.*" (Italics ours.)

Evidently, Congress did not consider the item just quoted, which is infinitely stronger and more direct in language than the parenthetical phrase

> "caused by the discontinuance of the offices of the surveyors general in those states"

upon which the Court of Claims rests its decision in this case, to have actually abolished the office of Surveyor General of Kansas and so, one month after the date on or before which its legislation of March 3,

1875, had provided that the office should be "closed and discontinued", it enacted additional legislation providing specifically that the office

> "is hereby abolished from and after the thirtieth of September next."

An office, created by permanent statute and filled by the President, by the advice and consent of the Senate, is not a thing to be made a bagatelle of by any Bureau or Department head or by the President of the United States himself and parenthetical phrases, copied from the annual estimates into appropriation acts carrying authority for one year's expenditures of the government, should not, unless they show on their face an actual consideration by Congress of the matter and an evident intent to pass thereupon, be held to carry a legislative covering up of the illegal acts of such Bureau or Department heads, in attempting of their own authority to abolish the office, and a confirmance of the result thus illegally attempted to be attained.

Congress, then, passed no special act abolishing the office of Surveyor General of Louisiana. Was it abolished under the terms of any general enactment and, if so, when?

Appellant's Fifth Point on Salary.

The office of Surveyor General of Louisiana was automatically abolished on June 30, 1910, by the operation of Sections 2218, 2219 and 2221 of the Revised Statutes of the United States.

Sec. 2218 of the Revised Statutes of the United States provides that:

> "whenever the surveys and records of any such districts (*i. e.*, surveying districts) are completed, the surveyor-general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, or to such other officer as may be authorized to receive them, all the field-notes, maps, records and other papers appertaining to land titles within the same; and the office of surveyor-general in every such district shall thereafter cease and be discontinued."

Sec. 2219 of these Revised Statutes provides that:

> "In all cases where, as provided in the preceding section, the field-notes, maps, records, and other papers appertaining to land titles in any State are turned over to the authorities of such State,"

the powers, etc., formerly vested in the Surveyor General thereof shall devolve on the Commissioner of the General Land Office. Sec. 2221, following, provides that:

> "The field-notes, maps, records and other papers mentioned in section twenty-two hundred and nineteen shall in no case be turned over to the authorities of any State until such State has provided by law for the reception and safe-keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United States."

Here, then, are the circumstances under which the office of Surveyor General of a State comes to an end under the terms of general statute law. When the surveys and records of a surveying district are completed, and the State, including such surveying district, provides by law for the reception and safekeeping

of the same as public records and for the allowance of free access to the same by the authorities of the United States, then "the surveyor general" of such district—the statute does not say a custodian appointed by the Secretary of the Interior—shall be required to deliver those surveys and records to the properly authorized officer of the State, and then, and then only, if under the provisions of these sections of the Revised Statutes, the office of Surveyor General in such district "shall cease and be discontinued."

Now what are the facts in this case? The records of the office of Surveyor General of Louisiana were not completed at the close of the fiscal year ending June 30, 1909, for Congress was asked for and granted an appropriation for the fiscal year ending June 30, 1910, "To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota and Louisiana." And the State of Louisiana did not provide for the reception and safekeeping of those surveys and records, and for the allowance of free access to the same by the authorities of the United States, until June 10, 1910, on which date the Governor of Louisiana approved the act passed by the Assembly of that State for the purpose. And those surveys and records were not turned over to the State of Louisiana until 4:30 P. M. on June 30, 1910. It follows that the office of Surveyor General of Louisiana did not "cease and be discontinued" until 4:30 P. M. on June 30, 1910, one calendar year after the last day for which James Lewis received compensation as the incumbent thereof.

Appellant's Sixth Point on Salary.

James Lewis remained Surveyor General of Louisiana from July 1, 1909, to June 30, 1910.

Now, what was James Lewis's status during this year extending from July 1, 1909, to June 30, 1910, both inclusive? He had been reappointed and recommissioned to the office of Surveyor General of Louisiana on January 18, 1905, for a term of four years from that date. Under the provisions of Sec. 2222, Revised Statutes, he was authorized to continue in the uninterrupted discharge of his regular official duties after the day of expiration of his commission and until a new commission should be issued to him or a successor enter upon the duties of his office, unless the President saw cause otherwise to determine. The President did not see such cause. He did not nominate anyone else for the office, nor did he ask James Lewis's resignation. Lewis was performing the duties of his office without complaint when his superior officer, the Commissioner of the General Land Office, sent a clerk from the General Land Office to New Orleans with instructions to close up Lewis's office, ship its equipment to Washington or sell it, and send its records to Baton Rouge in charge of a custodian appointed by the Secretary of the Interior and instructed by the Commissioner to assume control of them. And these orders James Lewis was directed by the said Commissioner of the General Land Office to "furnish" said clerk "all facilities for carrying out" as well as to "give him such assistance as he may need." Thus Lewis was unlawfully deprived of his rights as Surveyor General of Louisiana by his superior officer and by him wrongfully put out of possession of the records and equipment without which

it was impossible for him to perform his statutory duties. But neither the Commissioner of the General Land Office nor the Secretary of the Interior could deprive him of the office of Surveyor General of Louisiana itself and it is submitted that, under the facts, James Lewis continued to hold that office until it ceased and was discontinued by the operation of law at 4:30 P. M. on June 30, 1910.

APPELLANT'S SEVENTH POINT ON SALARY.

The Salary claimed should be allowed at the rate of $2,000 per annum.

It follows from the above that James Lewis, as Surveyor General of Louisiana during the whole of the fiscal year ending June 30, 1910, was entitled to salary from the United States for that year and appellant, his Executrix, is now entitled thereto, none having been paid as yet. This salary, appellant contends, should be allowed at the statutory rate of $2,000 per annum fixed by Section 2208 of the Revised Statutes. It is true that when Congress appropriated for James Lewis's salary, it appropriated only $1,800 a year in full for the services of each fiscal year for which the appropriation was made. Such appropriations, however, made for but one year at a time, merely suspended Section 2208 of the Revised Statutes while they themselves were severally operative. (*United States* v. *Fisher*, 109 U. S. 143, 146.) As Congress appropriated no money for James Lewis's salary for the fiscal year ending June 30, 1910, and, consequently, enacted no provision that he should take $1800 in full compensation for the service of that year, it is submitted that Section 2208 of the Revised Statutes governs this case

and entitles appellant, in the right of James Lewis, to the full statutory salary of $2,000, fixed thereby, for the year James Lewis held the office of Surveyor General of Louisiana and received no salary therefor—July 1, 1909 to June 30, 1910.

2. Fees.

APPELLANT'S CONTENTION.

Appellant's contention as to this item is that Section 5 of the Act of Congress entitled "An Act to create the office of surveyor of the public lands for the State of Louisiana," approved March 3, 1831, remained in full force and effect up to and during the entire time of James Lewis's incumbency of the office of Surveyor General of Louisiana, in so far, at least, as it fixed the fees to be charged for copies of plats of surveys and transcripts from the records of his said office, furnished by him to private individuals applying for the same; that under the terms of said Section 5 of the Act approved March 3, 1831, and the custom prevailing in his office from 1831 to 1907, James Lewis was entitled to retain the fees, so charged, as perquisites; that Section 1765 of the Revised Statutes has no applicability to the facts of this case; that the orders of the Commissioner of the General Land Office, requiring James Lewis to have these fees turned into or to turn them himself into the Treasury of the United States, were without authority of law and void, and that appellant, his Executrix, is entitled, therefore, to recover back from the United States the fees so turned into the United States Treasury over James Lewis's protest, as set forth in the findings of the Court below. (Rec., 15-18.)

THE COURT OF CLAIMS' DECISION.

The Court of Claims held that Section 5 of the said Act of March 3, 1831, did not allow these fees to the Surveyor General of Louisiana as perquisites of his office and that Section 1765 of the Revised Statutes is applicable to the facts in this case. On these holdings it rendered judgment against appellant on this item also.

APPELLANT'S FIRST POINT ON FEES.

Section 5 of the act of Congress entitled "An Act to create the office of surveyor of the public lands for the State of Louisiana," approved March 3, 1831, remained in full force and effect up to and during the entire time of James Lewis's incumbency of that office, in so far, at least, as it fixed the fees to be charged by the Surveyor General of Louisiana for copies of plats of surveys and transcripts from the records of his office furnished by him to private individuals applying for the same.

This Act, so far as it is material to this cause, is set out on pages 6 and 7, and also on page 22 of the Record. The particular words here involved are

> "and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

The provision of law just quoted has never been expressly repealed and, as it is not included in whole or in part in the Revised Statutes of the United States, appellant contends that it was not repealed by the enactment of said Revised Statutes.

Sections 5595 and 5596 of the Revised Statutes (Title LXXIV—Repeal Provisions) are as follows:

> "Sec. 5595. The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited, as The Revised Statutes of the United States.
>
> "Sec. 5596. All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature; Provided, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment."

It will be seen from the above (1) that the Revised Statutes did not codify all of the existing Federal statute law, but only such of it as was general in its nature (Sec. 5595), and (2) that, although the general language in the first lines of Sec. 5595 repeals "All acts of Congress . . . any portion of which is em-

braced in any section of said revision," the proviso in the latter lines of the section expressly saves "provisions of a . . . local . . . character," although contained in an act other provisions of which, general in their nature, have been embraced in the revision. It is, therefore, to the fact that the provisions of the Act of March 3, 1831, relating to fees, in Section 5 thereof, are local in their nature that their omission from the Revised Statutes is to be attributed and not to any intent on the part of Congress to repeal them by the enactment of a revision and codification of those parts of the Federal law in their nature general as distinguished from local.

That the above quoted provision of the Act of March 3, 1831, *supra*, remained in force during James Lewis's service as Surveyor General of Louisiana was also the view consistently held and acted upon by the General Land Office. In the Commissioner's letter to James Lewis of May 9, 1907, the Commissioner advised him that, this law being unrepealed, he should continue to charge the fees established thereby. (Finding XIII, Rec., p. 17.) Again, in the Commissioner's letter to James Lewis dated November 15, 1907, the Commissioner directed him to continue to charge the fees established by this Act of March 3, 1831, for furnishing copies of plats and transcripts from the records of his office. (Finding XVI, Rec., p. 18.) And it is expressly set forth in Finding XI on page 16 of the Record that during all of the time from the passage of this Act of March 3, 1831, up to the period of the acts of the Commissioner complained of herein, said Commissioner of the General Land Office and his superior, the Secretary of the Interior, acquiesced in the construction of this Act contended for by appellant herein, the basis of

which was, of course, the continued effectiveness of the Act. The General Land Office, therefore, during all of James Lewis's incumbency of his office of Surveyor General of Louisiana, recognized this provision relating to fees of Section 5 of the said Act of March 3, 1831, as in full force and effect. The weight that should be accorded to this uniform departmental construction, in determining the status of this provision in relation to this case, will be discussed further in connection with appellant's next point.

APPELLANT'S SECOND POINT ON FEES.

Under the terms of said Section 5 of the act approved March 3, 1831, and under the custom prevailing in his office from 1831 to 1907, James Lewis was entitled to retain the fees herein involved as perquisites of his office of Surveyor General of Louisiana.

When Congress passed said Act of March 3, 1831, and provided in Section 5 thereof that:

> " . . . for every copy of a plat of survey there shall be paid twenty-five cents, and for any transcript from the records of said office there shall be paid at the rate of twenty-five cents for every hundred words by the individual requiring the same,"

to whom was it intended that said fees were to go? A review of the legislation which preceded said Act of March 3, 1831, and which it superseded, shows clearly that it was intended that said fees should be perquisites attaching to the office of Surveyor General of Louisiana, to be retained by him as his private property in addition to his statutory salary. Such a review follows.

On May 16, 1796, the President approved an Act of

Congress entitled "An Act providing for the Sale of the Lands of the United States in the territory northwest of the River Ohio, and above the mouth of Kentucky River" (1 Stat. 464), which provided, *inter alia* (Sec. 1):

> "That a surveyor-general shall be appointed, whose duty it shall be to engage a sufficient number of skillful surveyors, as his deputies; whom he shall cause, without delay, to survey and mark the unascertained outlines of the lands lying northwest of the river Ohio and above the mouth of the river Kentucky, in which the titles of the Indian tribes have been extinguished, and to divide the same in the manner hereinafter directed: . . ."

On March 3, 1803, by approval of the President, an Act of Congress became law entitled "An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the State of Tennessee," in which it was provided (Sec. 10):

> "That a surveyor of the lands of the United States, south of the State of Tennessee, shall be appointed, whose duty it shall be to engage a sufficient number of skillful surveyors as his deputies, and to cause the lands above mentioned, to which the titles of the Indian tribes have been extinguished, to be surveyed and divided in the manner hereafter directed, and to do and perform all such other acts, in relation to the said lands, as the surveyor-general is authorized and directed to do in relation to the lands lying northwest of the river Ohio, and above the mouth of the river Kentucky." (2 Stat. 229, 233.)

On March 26, 1804, the President approved an Act of Congress entitled "An Act erecting Louisiana into

two territories, and providing for the temporary Government thereof." This Act (2 Stat. 283), provided (Sec. 1):

> "That all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi River at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a territory of the United States, under the name of the territory of Orleans; . . ."
>
> * * * * * *
>
> "Sec. 12. The residue of the province of Louisiana, ceded to the United States, shall be called the district of Louisiana; . . ."

Following the creation of the Territory of Orleans, an act was passed by Congress, approved March 2, 1805, entitled "An Act for ascertaining and adjusting the titles and claims to land, within the territory of Orleans, and the district of Louisiana" (2 Stat. 324). Section 3 of this Act provided:

> "That for the purpose of more conveniently ascertaining the titles and claims to land in the territory ceded as aforesaid, the territory of Orleans shall be laid off into two districts, in such manner as the President of the United States shall direct; . . ."

Section 7 provided:

> "That the powers vested by law in the surveyor of the lands of the United States south of the State of Tennessee, shall extend over all the public lands of the United States, to which the Indian

title has been, or shall hereafter be extinguished, within the said Territory of Orleans; . . ."

The above act was followed by the enactment of "An Act supplementary to an Act entitled 'An Act for ascertaining and adjusting the titles and claims to land, within the territory of Orleans, and the district of Louisiana,'" approved April 21, 1806 (2 Stat. 391). Section 9 of this Act reads as follows:

> "That the surveyor of the public lands, south of Tennessee, be, and he is hereby directed to appoint a principal deputy for each of the two land districts of the territory of Orleans, whose duty it shall be to reside and keep an office in the said districts respectively, . . . and generally to perform in such districts respectively, in conformity with the regulations and instructions of the said surveyor of the public lands south of the state of Tennessee, the duties imposed by law on said surveyor. And *each of the principal deputies shall receive* an annual compensation of five hundred dollars, and in addition thereto, *the following fees*, that is to say: *for examining and recording the surveys executed by any of the deputies, at the rate of twenty-five cents for every mile of the boundary line of such survey, and for a certified copy of any plat of a survey in the office, twenty-five cents.*" (Italics ours.)

On February 20, 1811, an Act of Congress was approved (2 Stat. 641) authorizing the people of the Territory of Orleans to form a constitution and a state government as a prerequisite to admission as a State in the Union, and, on April 8, 1812, an Act of Congress became a law (2 Stat. 701) admitting the former Territory of Orleans into the Union as the State of Louisiana.

Turning now to the Act of March 3, 1831, the material portions of which appear on pages 6-7 of the Record, it will be seen at once that Section 1 devolves on the Surveyor General of Louisiana the authority and duties of the two principal deputies of the Territory of Orleans, provided for in Section 9 of the Act of April 21, 1806, *supra*. It will also be seen that Section 5 of said Act of March 3, 1831, expressly abolished "the fees authorized by law for examining and recording surveys," but provides that "for every copy of a plat of survey, there shall be paid twenty-five cents. . . ." This will appear more clearly on seeing the material portions of the two acts in juxtaposition. (The italics are ours.)

Act of April 21, 1806 (2 Stat. 391).

Sec. 9. "That the surveyor of the public lands, south of Tennessee, be, and he is hereby directed to appoint a **principal deputy for each of the two land districts of the territory of Orleans.** . . .

* * * * *

And **each of the principal deputies shall receive an annual Compensation** of five hundred dollars, **and in addition thereto, the following fees,** that is to say *for examining and recording the surveys* executed by any of the deputies, at the rate of twenty-five cents for every mile of the boundary line of such survey, and **for a certified copy of any plat of a survey in the office, twenty-five cents."**

Act of March 3, 1831 (4 Stat. 492).

Sec. 1. "That a **surveyor general for the State of Louisiana** shall be appointed, who shall **have the same authority,** and perform the same duties, . . . **as are now vested in,** and required of the surveyor of the lands of the United States, south of the State of Tennessee, or of **the principal deputy surveyors in the said State;** . . ."

Sec. 5. **"That the surveyor general . . . shall be allowed an annual salary** of two thousand dollars . . .

* * * * *

and that the fees heretofore authorized by law *for examining and recording surveys be, and the same are hereby abolished;* . . . . and **for every copy of a plat of survey, there shall be paid twenty-five cents,** and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

From the above it will be clearly seen that (1) the fees for examining and recording surveys here abolished, and (2) the fee of twenty-five cents for a copy of a plat of survey, here allowed, were both previously authorized by Section 9 of said Act of April 21, 1806, and said Section 9 clearly provides that each of the

principal deputies should "receive" said fees "in addition" to his "annual compensation." As the authority of these two principal deputies was bestowed upon the Surveyor General of Louisiana by Section 1 of said Act of March 3, 1831, and Section 5 authorized the same fee to be charged for a copy of a plat of survey as did Section 9 of the said Act of April 21, 1806, and under said Section 9 said fees were expressly made a perquisite of the principal deputies to whose authority the Surveyor General of Louisiana succeeded, it is submitted that Section 5 of said Act of March 3, 1831, was intended to and did give said fees to the Surveyor General of Louisiana as perquisites of his office in addition to his annual compensation. And if that be true of the fees authorized to be charged for a copy of a plat of survey by said Section 5, it must be equally true of the fees authorized in the same section and sentence thereof to be charged for transcripts from the records of the office of Surveyor General.

It will be noted that Section 9 of the Act of April 21, 1806, *supra*, fixed the fee of twenty-five cents for a *certified* copy of any plat of survey in the office, but that Section 5 of the Act of March 3, 1831, in repeating the language of Section 9 of the Act of April 21, 1806, in this regard, omitted the word *certified*. Thereafter $1.00 additional was charged for a certificate and seal, which charge was treated, like the fees just described, as a perquisite of the Surveyor General and became established by custom (Record, p. 16).

It is, of course, not contended that the Act of April 21, 1806, *supra*, remained in anywise in force as to Louisiana after the passage of the Act of March 3, 1831. But it is contended that the provisions of the earlier act throw light upon and make clear the mean-

ing of the later act, that of March 3, 1831, substituted for it.

To summarize, while the act of 1831 abolished the fees for *examining and recording* surveys, authorized by the Act of 1806—and those are the only fees it did abolish—it specifically retained the fees for *furnishing copies of plats* of surveys authorized by the earlier act, it specifically vested the newly-created Surveyor General of Louisiana with the authority, as to Louisiana, of the Surveyor of the lands south of Tennessee and his principal deputies, the Act of 1806 specifically provided that the fees authorized by it for furnishing copies of plats should be received by the principal deputies in addition to their salaries, and the act of 1831 did not make any provision to the contrary. It must be concluded, therefore, that the authority of the deputies, under the Act of 1806, specifically conferred by the Act of 1831 on the Surveyor General of Louisiana, included the authority granted the deputies by the Act of 1806 to receive the fees in question in addition to their salaries.

This construction, contended for by appellant, was, as the record shows (Finding XI, Rec., p. 16) the uniform construction of the provision in question from the Act of March 3, 1831, given to it by the successive Surveyors General of Louisiana and acquiesced in by the Interior Department until the orders and acts of the Department in 1907 complained of herein. In determining the weight to be allowed to this uniform and long-continued departmental construction of this Act, both as regards its continued effectiveness, discussed in Appellant's First Point on Fees, and as regards its meaning, attention is invited to the recent case of *The United States* v. *Midwest Oil Company*

et al., 236 U. S. 459, 472, decided by this Court on February 23, 1915, in which the whole decision rests upon the force of custom, long-continued and acquiesced in, as establishing the law. As said by Mr. Justice Lamar, in delivering the opinion of the Court:

> "It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself —even when the validity of the practice is the subject of investigation."

APPELLANT'S THIRD POINT ON FEES.

Section 1765 of the Revised Statutes has no applicability to the facts of this case.

It remains to be shown that Section 1765 of the Revised Statutes of the United States, on which the Court of Claims seems to have principally rested its adverse decision on this item, has no applicability whatever to the facts of this case. In the first place, it is obviously concerned and concerned alone with service to the Government and the services, for which the fees in dispute in this case were received, were services rendered to private individuals at their request and for their personal convenience. Second, Section 1765 shows no intention whatever to interfere with the en-

joyment of any emoluments already fixed by law, for the additional compensation, receipt of which it prohibits, is compensation additional to "salary, pay or emoluments" "fixed by law or regulations." It is appellant's contention in this case, as shown above, that these fees were emoluments "fixed by law," that is, by Section 5 of the Act of March 3, 1831, *supra*, which, given its proper effect and construction, both authorized the collection of the fees and authorized the Surveyor General of Louisiana to retain them in addition to his salary as perquisites of his office. If appellant is wrong in this contention, her whole case on this item of fees falls. If she is right, Section 1765 of the Revised Statutes has nothing to do with this case. And it is submitted that there is nothing in *King* v. *United States*, 147 U. S. 676 and *Woodwell* v. *United States*, 214 U. S. 82, cited in the opinion of the Court of Claims, which is inconsistent with this view.

Appellant's Last Point on Fees.

The orders of the Commissioner of the General Land Office, requiring the fees in dispute herein to be turned into the Treasury of the United States, were without authority of law and void.

If then, as has been shown, Section 5 of the Act of March 3, 1831, so far as it authorized the charge of the fees in question, remained in force during all of James Lewis's incumbency of the office of Surveyor General of Louisiana, and, as has also been shown, was admitted to be in force by the General Land Office, and if, as has been shown, said Section 5 gave said fees to the Surveyor General as a perquisite of his office, it follows that the orders of the Commissioner of the

General Land Office, requiring said fees to be deposited in the Treasury of the United States, were without authority of law and void. For a statute of the United States can not be changed by an order of the Commissioner of the General Land Office. And since the fees here sued for were turned into the Treasury of the United States under compulsion from James Lewis's superior officer, the Commissioner of the General Land Office, but against James Lewis's repeated protests, it is submitted that appellant is entitled to recover them back from the United States. For James Lewis did protest vigorously against his fees being turned into the United States Treasury in the letters written by him to the Commissioner of the General Land Office on May 3, 1907, and May 24, 1907. (Rec., p. 17.)

CONCLUSION.

For the reasons above set forth it is submitted that the decision of the Court of Claims on both items, salary and fees, should be reversed and that appellant should have judgment for the whole amount of $4,287.80 claimed.

L. Russell Alden,
Edward F. Colladay,
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Union Trust Building,
Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

JOSEPHINE B. LEWIS, EXECUTRIX OF THE estate of James Lewis, deceased, appellant,
v.
THE UNITED STATES.
No. 197.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing the petition. Appellant sued to recover $4,287.80, of which $2,000 was for salary as surveyor general of Louisiana covering a period from June 30, 1909, to July 1, 1910, and $2,287.80 in fees received by the said office of surveyor general and deposited with the United States Treasury.

The following sections of the Revised Statutes are involved in this case:

> 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay,

extra allowance, or compensation in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

2207. There shall be appointed by the President, by and with the advice and consent of the Senate, a surveyor general for the States and Territories herein named, embracing, respectively, one surveying district, namely: Louisiana. * * *

2208. The surveyors general of Louisiana * * * shall each receive a salary at the rate of $2,000 a year.

2217. The commission of every surveyor general now in office and of every surveyor general hereafter appointed shall cease and expire, unless sooner vacated by death, resignation, or removal from office, in four years from the date of the commission.

2218. The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying districts for which surveyors general have been or may be appointed, at the earliest periods compatible with the purposes contemplated by law; *and whenever the surveys and records of any such district are completed* the surveyor general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, *or to such other officer as may be authorized to receive them*, all the field notes, maps, records,

and other papers appertaining to land titles within the same; *and the office of surveyor general in every such district shall thereafter cease and be discontinued.*

2219. In all cases where, as provided in the preceding section, the field notes, maps, records, and other papers appertaining to land titles in any State are turned over to the authorities of such State, the same authority, powers, and duties in relation to the survey, resurvey, or subdivision of the lands therein, and all matters and things connected therewith, as previously exercised by the surveyor general, whose district included such State, shall be vested in, and devolved upon, the Commissioner of the General Land Office.

2220. Under the authority and direction of the Commissioner of the General Land Office any deputy surveyor or other agent of the United States shall have free access to any such field notes, maps, records, and other papers for the purpose of taking extracts therefrom, or making copies thereof, without charge of any kind.

2221. The field notes, maps, records, and other papers mentioned in section twenty-two hundred and nineteen shall in no case be turned over to the authorities of any State until such State has provided by law for the reception and safe-keeping of the same as public records and for the allowance of free access to the same by the authorities of the United States.

2222. Every surveyor general, register, and receiver, except *where the President sees cause*

> *otherwise to determine*, is authorized to continue in the uninterrupted discharge of his regular official duties after the day of expiration of his commission and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office; and the existing official bond of any officer so acting shall be deemed good and sufficient, and in force, until the date of the approval of a new bond to be given by him, if recommissioned, or otherwise, for the additional time he may so continue officially to act, pursuant to the authority of this section [Italics ours.]

On January 18, 1905, James Lewis was reappointed to the office of surveyor general of Louisiana at a salary of $2,000 a year (sec. 2208, R. S.), and for a period of four years from that date. (Sec. 2217, R. S.)

On December 7, 1908, the Commissioner of the General Land Office wrote to decedent stating that it was proposed to discontinue the office of surveyor general of Louisiana on June 30, 1909. (R. 12.)

On March 4, 1909, Congress passed the sundry civil appropriation act containing the following provision (35 Stat., ch. 299, p. 987):

> To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota, and Louisiana, caused by the discontinuance of the offices of the surveyors general in those States, six thousand five hundred dollars.

The legislative, executive, and judicial appropriation act for the fiscal year 1909–10 omitted any appropriation for the salary of the office of surveyor general of Louisiana.

On May 11, 1909, the commissioner wrote decedent in part as follows:

> As the office of surveyor general of Louisiana will be permanently closed and discontinued on July 1, 1909, the records thereof, excepting such as may be required for use in this office, will be turned over to the State of Louisiana, when proper provision has been made by the legislature for their safe-keeping and providing for free access to them by the authorities of the United States, as provided by sections 2218, 2220, and 2221, Revised Statutes.
>
> As no provision has been made by the legislature for the reception of the records under the conditions above stated, it will become necessary to appoint a custodian of them on July 1, at a salary of $1,000 per annum, who will retain them in his custody until the re- required law has been provided. * * * (Rec. pp. 12–13.)

On June 16, 1909, R. A. Ballinger, Secretary of the Interior, ~~wrote decedent as follows:~~ issued the following:

> Arthur Gascon, of Louisiana, is hereby appointed custodian of the documents and records pertaining to the office of the surveyor general of Louisiana upon the discontinuance of that office, at a salary of $1,000 per annum, to take effect upon July 1, 1909.
>
> Salary payable from the appropriation for completing field notes, etc., of surveys in Minnesota, North Dakota, and Louisiana.

> By transfer from chief clerk, office of surveyor general of Louisiana. (Rec. p. 14.)

On June 17, 1909, the commissioner wrote, in part, as follows:

> As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that it will be necessary to discontinue it after June 30, next. (R. 13.)

and informed decedent that John B. Batchelor, of the commissioner's office, had been detailed to supervise the transfer of its records from the surveyor's office to the State building at Baton Rouge, La., and of such articles as might be suitable for use to the commissioner at Washington. (Rec. pp. 13–14.) He also informed decedent that Arthur Gascon had been selected as custodian of the records until the State authorities provided for their care.

On June 10, 1910, an act of the General Assembly of the State of Louisiana (Rec., p. 15) was approved, providing for the reception and safe-keeping of the papers and records of the said surveyor general, and on June 30, 1910, Arthur Gascon, custodian, delivered them to the representative of the State of Louisiana.

On the 9th of January, 1915, the President of the United States ratified and confirmed the action of the Interior Department in discontinuing the office of the United States surveyor general for the district of Louisiana. (Rec., pp. 14–15.) Decedent performed no duties as surveyor after he was dispossessed of the office in the manner hereinbefore set forth.

Appellant claims the said sum of $2,090, salary beginning July 1, 1909, and ending June 30, 1910, on the ground that decedent's office continued to exist as provided by section 2222 of the Revised Statutes, until the State authorities were prepared to, and did, accept the records and papers of his office. Appellant further claims the sum of $2,287.80, fees, as perquisites of his office for the period from May 1, 1907, to and including June 30, 1909, under section 5 of the act approved March 31, 1831, because for many years both he and his predecessors had been accustomed to taking the fees prescribed in said act.

The Government's position is that Congress directly abolished the office of this surveyor general before July 1, 1909; that the act of the Secretary of the Interior in discontinuing the said office and terminating the incumbency of this surveyor general was ministerial and was, in effect, the act of the President and in conformity with and as authorized by section 2218 of the Revised Statutes, and was later ratified by the President (sec. 2222); and that appellant's claim for certain fees of the office must fail by reason of the fact that they are not provided for in the act of March 3, 1831 (4 Stat. 492), creating said office, and are prohibited by section 1765 of the Revised Statutes.

BRIEF OF ARGUMENT.

1. The office of surveyor general was discontinued June 30, 1909, by the act of March 4, 1909 (35 Stat. 945, at p. 987). This foreclosed appellant's claim for salary.

2. The Secretary of the Interior, under the authority of Congress, acted in a ministerial capacity in discontinuing this office. His act was that of the President, and constituted a discontinuance of the office after June 30, 1909.

3. Appellant was not entitled to fees for copies of plats of surveys or transcripts of records of the said office received from May 1, 1907, and deposited to the credit of the United States Treasury, for the reason that the same were not provided by statute and are prohibited by section 1765, Revised Statutes.

I.

The office of surveyor general of Louisiana was discontinued June 30, 1909, by the act of March 4, 1909 (35 Stat., 945, p. 987). This foreclosed appellant's claim for salary.

The duty of the officer (sec. 2218, R. S.) was to make a recorded survey of lands in the territory to which he was appointed. As soon as his work was completed the Secretary of the Interior was required to close up his office and turn the same over to State authorities.

Decedent had been reappointed for the statutory period (R. S. 2217) of four years, which expired January 18, 1909, and was holding over (R. S. 2222) until a new commission issued, his successor was appointed, or the office abolished by the President. The survey work of his office having been completed, on December 7, 1908, the Commissioner of the General Land Office notified him by letter (Rec. 12) that the office would be discontinued June 30, 1909. In keeping with this notice the Secretary

of the Interior in his estimates to Congress for the fiscal year ending June 30, 1909, on page 106, said:

> No estimate has been submitted for the offices of North Dakota, Florida, and Minnesota for the public surveys will be completed in these States by June 30, 1908. Because the public surveys of South Dakota are about completed, an increase in the salary of the Surveyor General was not deemed advisable; *and no changes in the appropriation for the Louisiana office are recommended for the reason that this office should be abolished, the public surveys having been completed for some time,* and the records should be transmitted to the State on or about June 30, 1909. [Italics ours.]

Congress, acting upon this notice from the Secretary in the sundry civil appropriation Act of March 4, 1909 (35 Stat., ch. 299, p. 987) inserted the following:

> To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota, and Louisiana, caused by the discontinuance of the offices of the surveyors general in those States, six thousand and five hundred dollars.

In the legislative, executive, and judicial appropriation bill for that year [1909–1910] Congress failed for the first time to provide for the salary of the said office. The failure to appropriate salary is inconsistent with the requirements of section 2208, R. S., which specified a salary of $2,000 a year for this office. The appropriation of money to complete the unfinished

work, coupled with a declaration of discontinuance of the office, was in derogation of R. S. 2208 and in conformity with section 2218, R. S., providing for the closing up of the office.

Congress was presumed to know the purpose of this office and it had notice from the Secretary of the Interior that the work had been completed and that the Secretary had recommended that the office be abolished. In view of these circumstances it seems obvious that its refusal to appropriate for the salary of the office and its appropriating of moneys for use in completing "the unfinished drafting and field notes * * * caused by the discontinuance" of the office constituted a direct discontinuance of the same. The Government maintains, however, that it was really unnecessary for Congress to embody any statement in the sundry civil appropriation act of 1909, declaring the discontinuance of the said office, since under section 2218 it had already instructed the Secretary of the Interior as to when the office should be closed and had further empowered him to act.

II.

The Secretary of the Interior, under the authority of Congress, acted in a ministerial capacity in discontinuing this office. His act was that of the President, and constituted a discontinuance of the office after June 30, 1909.

Congress having refused to appropriate a salary for this office for the year 1909–10, and having appropriated moneys for the unfinished work caused by the discontinuance of the office, left the duties to be

performed by the Secretary of the Interior in nature purely ministerial. The purpose of the office (R. S. 2218) was to make surveys of the district for which the surveyor general was appointed. The Secretary of the Interior was required to close the office when its purpose had been accomplished.

Such a condition had arrived in this case because the surveys were finished. Decedent had been given notice by the Secretary of the Interior, through the Commissioner of the General Land Office (Finding III, Rec. 12), that the office would be closed June 30, 1909. The Secretary of the Interior followed this up by a recommendation to Congress to discontinue the office. In compliance with his recommendation Congress refused to appropriate any salary for the surveyor general, but did appropriate for closing up the work of the office incident to the discontinuance thereof. Whatever the Secretary did after this act of Congress was ministerial. There was nothing judicial for him to do. His act (Findings IV and V, Rec. 13 and 14) being only ministerial, was, in law, the act of the President.

Williams, v. *The United States*, 1 How., 290.
Bishop v. *The United States*, 38 C. Cls., 485.
Heyden v. *The United States*, 38 C. Cls., 50.
O'Shea v. *The United States*, 28 C. Cls., 401.
Truit v. *The United States*, 38 C. Cls., 404.
Runkle v. *The United States*, (122 U. S., 543, 557).
Wilcox v. *Jackson*, (13 Peters, 266).
Wolsey v. *Chapman* (101 U. S., 755, 769).

Jones v. *The United States* (137 U. S., 203, 217).

Maxwell v. *The United States*, No. 31,246, decided February 9, 1914 (49 C. Cls., 262).

Moreover, the President, by his order of January 9, 1915 (Rec. 14), ratified the act of the Secretary of the Interior and the Commissioner of the General Land Office.

Since, then, the act was ministerial, and was, in law, that of the President, decedent could not retain the office under the terms of section 2222, R. S. He was holding over after an expired term, and the "President had seen cause" to discontinue the office.

It should be noted in this connection that the action of the Interior Department and the ratification by the President of that action worked no injustice or hardship upon the claimant's testator, for the reason that he had ample notice that his office was to terminate on June 30, 1909, and he performed no service whatever after ~~that date and during the period for which he now attempts to recover salary~~ dispossession. As no rights of third persons had intervened, even if the Secretary of the Interior had been without authority at the time (a proposition not conceded) yet the President's act ratifying and affirming "thus retroactively gives it validity." *Heinzen* v. *United States* (206 U. S. 370, 382).

III.

Appellant was not entitled to fees for copies of plats of surveys or transcripts of records of the said office received from May 1, 1907, and deposited to the credit of the United States Treasury, for the reason that the same were not provided by statute and are prohibited by section 1765, R. S.

Previous to May 1, 1907, decedent was accustomed to collect and retain as his own fees for copies of plats of surveys or transcripts of records of the said office. The act of March 3, 1831 (4 Stat. 492), creating the office of surveyor of public lands for the State of Louisiana, provided an annual salary of $2,000 and abolished fees for examining and recording surveys, but provided certain other fees to be paid with no provision as to their disposition. Since July 1, 1878, Congress had provided a salary of $1,800 a year for this office "as full compensation."

On May 1, 1907, decedent was required thereafter to deposit all fees for copies of plats of surveys or transcripts of records to the credit of the United States Treasury.

Appellant contends that since each incumbent of said office from 1831 to 1907 had received and retained said fees and the Department of the Interior had permitted him to do so, that such interpretation was of so long a standing as to be given the effect of law, and that therefore under the doctrine of long-continued construction decedent had a right to the same from 1907 to June 30, 1909, as perquisites of the office.

The said act of March 3, 1831, certainly does not authorize the incumbent to appropriate these fees to himself. Appellant attempts to go behind this act and read into it certain terms of the act of April 21, 1806 (22 Stat. L. 391). An examination of the two statutes will demonstrate that the latter act repeals the earlier, and in particular strikes at the roots of the fee emoluments to the occupant of this office and limits his remuneration to a fixed salary. Moreover, sec. 2208 R. S. again declares the salary of this office to be $2,000 and is silent regarding any additional fees. In view of the requirements of section 1765, R. S., since decedent was an officer of the public service whose salary was fixed by law, he could not receive any additional pay or emoluments unless the same was authorized by a law which explicitly stated that it was to be allowed as "additional pay, extra allowance or compensation." He was not so authorized by the act of March 3, 1831, to receive such fees. It would seem clear, therefore, that the prohibition of section 1765, R. S., applies and forecloses appellant's claim in this regard.

Respectfully submitted.

HUSTON THOMPSON,
Assistant Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

JOSEPHINE B. LEWIS, EXECUTRIX OF THE ESTATE OF JAMES LEWIS, DECEASED, APPELLANT,
vs.
THE UNITED STATES.
No. 197.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S REPLY BRIEF.

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Counsel for Appellant.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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vs.

THE UNITED STATES.

No. 197.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S REPLY BRIEF.

Reply to Appellees' First Point.

Appellees' first point in defense is a contention that the office of Surveyor General of Louisiana was discontinued on June 30, 1909, by the item in the Sundry Civil Appropriation Act of March 4, 1909 (35 Stat. 945, 987), which reads as follows:

> "To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing

> pertaining to surveys in the States of Minnesota, North Dakota and Louisiana, caused by the discontinuance of the offices of the Surveyors General in those States, six thousand five hundred dollars."

Appellant has clearly shown the error of this contention in her "Fourth Point on Salary," pages 20 to 25 of her initial brief, to which the attention of the Court is here invited anew. There should be pointed out, however, one or two inaccuracies of statement in appellees' brief which tend to confuse the issue and which, uncontradicted, might suggest a wrong conclusion.

Throughout their argument on their first point, pages 8 to 10 of their brief, appellees proceed upon the assumption that the work of the office of Surveyor General of Louisiana was completed on June 30, 1909. This is not true. As the Secretary of the Interior reported in his estimates to Congress for the fiscal year ending June 30, 1909, "*the public surveys*" in Louisiana were then completed. But the *records* in the office of the Surveyor General were not then completed, for an appropriation was asked and obtained "to complete the unfinished drafting and field-note writing pertaining to surveys" in the State. (See appellees' brief, page 9.) On June 30, 1909, there was, therefore, no such situation in existence as authorized the Secretary of the Interior to discontinue this office under the terms of Section 2218 of the Revised Statutes, for that section requires the surrender to the State of "*all the field notes, maps, records, and other papers pertaining to land titles*" in the Surveyor General's office being discontinued (and the drafting and field-note writing in the Louisiana office was not finished on June 30, 1909, as above shown) and the section authorizes this surrender only whenever *both* the *surveys* and the *records* of the district are completed, not when the surveys alone are completed and the records remain to be fin-

ished. And these records were not finished and turned over to the State of Louisiana, as the record in this case shows, until one year later, to wit, on June 30, 1910, the date upon which appellant contends the office of Surveyor General of Louisiana was actually discontinued under R. S. 2218 and 2221.

The Secretary of the Interior in his estimates for the fiscal year ending June 30, 1909, told Congress that the office of Surveyor General of Louisiana "should be abolished * * * and the records should be transmitted to the State on or before June 30, 1909." (Appellees' brief, p. 9.) Despite this statement, however, he asked and obtained of Congress, in the Sundry Civil Bill, an appropriation for the fiscal year 1909 to 1910 to *complete the work* of the office. The work of the office was not completed and the records thereof were not transmitted to the State of Louisiana until June 30, 1910. It is strained reasoning to claim, as does the Government, that the office was abolished by Congress on June 30, 1909, *before* its work was completed and by the very item in the appropriation bill which provided for its completion. Rather was it abolished *upon* its completion and under the authority of R. S. 2218 and 2221 on June 30, 1910.

Reply to Appellees' Second Point.

Appellees' second point in defense is that, if Congress did not abolish the office on June 30, 1909, then the Secretary of the Interior did and that his act was the act of the President removing James Lewis from office under Section 2222 of the Revised Statutes, the part whereof material herein provides that:

> "Sec. 2222. Every surveyor general, register and receiver, *except where the President sees cause other-*

> *wise to determine*, is authorized to continue in the uninterrupted discharge of his regular official duties, after the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office: * * *" (Italics ours.)

There is no evidence in this case, nor do appellees contend that the President personally took any action or indicated any determination in this matter prior to the attempted ratification later discussed. Appellees, therefore, have to fall back upon the proposition that the act of the head of an Executive Department, in matters which appertain to his duties, is the act of the President. To support this proposition, appellees cite a number of decisions, none of which, however, appellant contends, are applicable to the facts in this case, and which will be discussed and distinguished later in this brief.

Assuming, however, for the moment only, that appellees are correct in their contention that the Secretary of the Interior could legally exercise the power of determination vested in the President by Section 2222, Revised Statutes, and that such exercise of that power would, in contemplation of law, constitute an exercise thereof by the President, let us briefly review the admitted facts in this case to see what action the Secretary of the Interior, or his subordinate, the Commissioner of the General Land Office, took with reference to James Lewis' continuing in the discharge of his regular official duties after June 30, 1909. The action in detail is fully set forth in appellants' initial brief, at pages 2 to 9 thereof.

On December 5, 1908, the Commissioner of the General Land Office wrote to James Lewis a letter, in which said Commissioner stated that it was *proposed to discontinue* the office of Surveyor General of Louisiana on June 30, 1909.

In the estimates submitted to Congress for the service of the fiscal year ending June 30, 1910, the Commissioner of the General Land Office and the Secretary of the Interior omitted to include any estimate for James Lewis' salary.

On May 11, 1909, the Commissioner of the General Land Office wrote to James Lewis:

> "*As the office of the surveyor-general of Louisiana will be permanently closed and discontinued on July 1, 1909*, the records thereof * * * will be turned over to the State of Louisiana when proper provision has been made by the legislature for their safe-keeping * * * as provided by sections 2218, 2220 and 2221, Revised Statutes." (Rec., 12.) (Italics ours.)

On June 16, 1909, the Secretary of the Interior appointed Arthur Gascon

> "custodian of the documents and records pertaining to the office of the Surveyor-General of Louisiana upon the discontinuance of that office * * * to take effect upon July 1, 1909." (Rec., 14.)

On June 17, 1909, the Commissioner of the General Land Office wrote to James Lewis that

> "As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that *it will be necessary to discontinue it after* June 30, next." (Rec., 13.) (Italics ours.)

The Commissioner of the General Land Office, on the same day, sent a clerk from his office to close up James Lewis' office and ship its records to Baton Rouge and directed the custodian mentioned above to take charge of them there and care for them until the State of Louisiana

complied with the sections of the Revised Statutes under which said records were ultimately to be turned over to the State—which event happened one year later. (Rec., 14.)

Now, in the action reviewed above, there is no communication whatever to James Lewis from the Secretary of the Interior, and the communications sent to James Lewis by the Commissioner of the General Land Office contain no announcement to him whatever that it has been determined by anyone—let alone the President—that he shall cease to hold his office after June 30, 1909. The statements of the Commissioner of the General Land Office, to James Lewis are all to the same effect, namely, that his office—not his incumbency of it—would be discontinued on June 30, 1909, although such a discontinuance of the office was not within the power of the Commissioner, the Secretary, or even the President to ordain. The office could be abolished only by act of Congress, and the mere unauthorized announcement to Lewis by the Commissioner of the General Land Office that the office would be discontinued on June 30, 1909, when, in fact, it was not discontinued by law on that date, nor, indeed, until one year later, does not show a determination by the President of the United States, within the meaning of Section 2222, Revised Statutes, that Lewis should cease his incumbency of the office.

In this connection, it should be noted that the reason given Lewis by the Commissioner of the General Land Office as to why the office of Surveyor General of Louisiana would be discontinued on June 30, 1909, was that Congress had omitted to include an appropriation therefor in the appropriation act (see letter of June 17, 1909, Rec., 13), and this explanation should be weighed in the light of the fact that the omission in the appropriation act was due to the omission of the necessary items from the estimates submitted to Congress by the Commissioner.

The President, in fact, is not even mentioned in any of the communications to Lewis referring to the discontinuance of his office, none of the letters Lewis received referring to the subject were sent to him by the Secretary of the Interior, all of them came from the Secretary's subordinate, the Commissioner of the General Land Office, and none of them announced to Lewis that his *incumbency* of the office was to cease. And yet appellees contend that James Lewis was removed from his office by the President, under Section 2222, Revised Statutes, acting through the head of the Interior Department. The weakness of this contention appears most glaringly when viewed in the light of one of the appellees' own cases, cited by them on page 11 of their brief, the case of Truitt *v.* The United States, 38 C. Cls., 398.

That case involved the construction of Section 10 of the Act of April 22, 1898, 30 Stat., 362, which provided that "the President" might assign army officers to staff duty "in his discretion." Claimant was assigned to staff duty by an order stating that "By direction of the Secretary of War" he should report to Major-General Shafter, who should assign him to duty "under the provisions of Section 10, act of Congress approved April 22, 1898, * * *. By command of Major-General Miles." In holding that he was not assigned to duty by "the President * * * in his discretion," the Court said (page 403):

> "There can be no question but that the President may legally act through the head of a department. It may be said in general that while the superintendence of the administration devolves upon the President, he can not be required to become the head of every department for the performance of ministerial acts under his own hand, and such was the effect of the ruling in the case of Williams *v.* The United States (1 How., 290)."

(The Court then reviewed United States v. Eliason, Runkle v. United States and United States v. Fletcher.)

"We have thus referred to these cases to show the extent of the President's power to act through the head of a department, and in every instance—and we are aware of no authority to the contrary—it will be noted the power of the President to thus act was by the head of the department and not by a subordinate.

"The order assigning the claimant to staff duty was issued by Major-General Miles by direction of the Secretary of War, and even if we were to assume that the President could have acted in the premises through General Miles, there is nothing in the order or in the record to show that the President directed the issuance of the order. The order, on its face, purports to have been issued by direction, not of the President, but by the Secretary of War. So there is nothing to show that the President exercised his discretion in the assignment of the claimant to staff duty."

Appellant feels that the points above made answer conclusively appellees' objections to her first cause of action. She wishes, however, to discuss briefly the cases cited by appellees in their brief so as to show that, under no view, can they be held destructive of appellant's position in the case. All of these cases discuss the question of when the act of the head of an Executive Department is the act of the President. In some of them, the hand of the cabinet officer is held to be the hand of the President; in others not. Where is the dividing line? The truth is, that there are some major functions which can be performed only by the President personally and some minor functions which must be left to his official representatives at the head of the various departments for sheer lack of physical capacity in any one man to conduct the business of a whole government personally No one but the President can approve

acts of Congress so as to convert them into laws, or exercise the pardoning power: to hold that the President must personally supervise every withdrawal of land from public entry under the land laws authorizing withdrawals by his order would be ridiculous. It would be foolish to attempt a full definition or classification of these major and minor functions. It is far safer and easier to place each case as it arises. But an analysis of the cases cited by appellees indicates quite clearly what sort of functions are major and what sort minor. Appellant believes that this examination will show that the removal from office of an official, appointed by the President by and with the consent of the Senate and holding office under a commission, is a major function, and, when the statute says such an official shall continue in office "except where the President sees cause otherwise to determine" (R. S. 2222) it means that the President must personally exercise such determination and no other person for him.

Of the cases cited by appellees on pages 11 and 12 of their brief, Truitt *v.* The United States, has been discussed already in this Reply Brief and there shown to be an authority against appellees rather than for them.

In Williams *v.* The United States, appellees' leading case, the President had, in writing, given the Secretary of the Treasury direction to make advances of money, as need arose, in certain classes of cases described in those written directions, and an advance of money by direction of the Secretary of the Treasury, acting under the President's blanket written authorization, was rightly held to have been made "under the special direction of the President," as required by the statute. The case is an authority against appellees rather than for them, the facts showing personal action by the President under the statute.

Bishop *v.* The United States and Runkle *v.* The United

States were both cases involving the Presidential review of courts-martial, the first naval, the second military, the sentences of which, under the statutes involved, could not legally be carried into execution, if they extended to dismissal from the service, until confirmed by the President. In Bishop *v.* The United States, the President wrote "Approved" on the sentence over his signature, and the Court held that to be sufficient evidence that he had personally examined the sentence. In Runkle *v.* The United States, the Secretary of War endorsed his approval upon the sentence, together with the statement that "the President is pleased to remit all of the sentence, except so much thereof as directs cashiering," and issued a General Order announcing that Runkle had ceased to be an officer of the army. It did not appear, however, that the President had personally confirmed the sentence, and, in view of this fact, the Court held that the sentence never became legally effective. It is true that the President's action in reviewing the proceedings of courts-martial is judicial in its nature and not ministerial, but it must also be remembered that his confirmation is required only when the sentence extends to dismissal from the service or death, and that, in holding that such confirmation by the President must be by him personally, the Courts are so construing the statutes involved as to prevent anyone but the President in person removing from office officers appointed by the President personally by and with the advice and consent of the Senate and holding commissions under him. These two cases, if authority for either side in the present case, are authorities in favor of appellant.

Wilcox *v.* Jackson and Wolsey *v.* Chapman were both cases of reservation from sale of public lands which statute provided were not to be sold if reserved from sale by order of the President. In each case the order reserving the lands

from sale was issued by the head of an Executive Department and such order of the Secretary was held to be the order of the President within the meaning of the statute. Clearly the making of numerous reservations from sale of public lands is not a major function, and the power to make them, vested in the President by statute, must, under any reasonable interpretation, be held to be legally exercised when exercised by the Secretary whom the President has made his other self for the detailed management of the Executive Department committed to his charge. The cases are essentially different from that now at issue and are not authorities against appellant's contention.

Maxwell *v.* The United States falls within the same reasoning as the two cases just discussed, though it presents the question involved in weaker form, as the construction of no statute was involved in it. The President can not be expected, in reason, to busy himself personally with every needed little modification of the Army Regulations. That is a minor function: the reason for there being a Secretary of War is that there may be someone to perform such functions for the President. The Court rightly applied to this case the principle that "the acts of the heads of departments, within the scope of their respective duties, are treated as the acts of the President." The facts in this case differentiate it entirely from the case at bar.

In the same class also is Hayden *v.* The United States, which involved an expenditure authorized by the Secretary of the Navy and by him directed to be charged against the emergency appropriation of $50,000,000 for the national defense voted, at the beginning of the Spanish-American War, "to be expended at the discretion of the President." The Court held that the direction of the Secretary of the Navy was an exercise of the Presidential discretion, saying (pages 49-50):

> "The appropriation of the $50,000,000 and the large power granted to the President are clear indications of the legislative recognition of the almost endless task of providing in detail as to the mode and manner of the expenditure of the money appropriated by the statute * * *."

Clearly it was not the legislative intent to require the President to give personal attention to each and every expenditure, however small in amount, that the exigencies of the defense of the nation in time of war with a foreign power might demand. The reason there is a Secretary of the Navy is that, within the scope of his duties, he may relieve the President of the burden of transacting personally such minor functions.

O'Shea *v.* The United States and Jones *v.* The United States, the two remaining cases cited by appellees, are alike in that, in each, the decision of the Court, that the act of the head of the Executive Department in question was the act of the President, was based upon a recital by such head of the department that the President had acted, which recital was held by the Court to be conclusive in the absence of contradictory evidence. No such recital appears in the case at bar, which fact alone sufficiently distinguishes these two cases as not in point on the present case.

In O'Shea *v.* The United States, the letter from the Secretary of War, which claimant alleged constituted his commission as a post-chaplain in the army under a recess appointment, contained the distinct statement that:

> "You are hereby informed that the President of the United States has appointed you post-chaplain in the service of the United States * * *."

In upholding the validity of this letter as a commission, the Court said:

> "This appointment is in the form then used for recess appointments to the Army; the President had the power to make the appointment, and the act of the Secretary (which expressly declares that the President had made the appointment) is conclusive evidence of the fact that it was made."

In Jones *v.* The United States, the question was whether a certain guano island had been set apart as appertaining to the United States within the meaning of an act providing that, under certain circumstances, such islands might "at the discretion of the President of the United States, be considered as appertaining to the United States." The evidence showed that on July 7, 1858, the Secretary of State had written to the Secretary of the Navy that the President, being of the opinion that it was "advisable to exercise the authority vested in him" by the act "directs that you will cause a competent force to repair to that island"; that the commander of the vessel ordered by the Navy Department to the island had written to the Haytian Minister of Foreign Relations that "I am authorized to say to you that the President of the United States is of opinion that, in this case, it is advisable to exercise the authority vested in him by the fifth section of this act"; that the Assistant Secretary of State afterwards wrote to the commercial agent of Hayti at Boston that the protection of the government had been extended to the island under the terms of the act, and that, on December 8, 1859, the Secretary of State had issued a public proclamation to the same effect. On these facts, the Court held that (137 U. S., 217):

> "The power, conferred on the President of the United States by Section 1 of the act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a

> strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President."

Both of the above two cases, as stated before, differ from the case at bar in that, in each, it appeared either affirmatively or presumptively that the President himself had acted, and, there being no contradictory evidence, the statement of the head of the department that such action had been taken was held conclusive of the fact.

To summarize, appellant contends that the power of determination vested in the President by Section 2222 Revised Statutes could only be exercised by him personally, it being a major function involving the removal from office of an official appointed by the President by and with the advice and consent of the Senate and holding under a duly issued commission, that therefore the Secretary of the Interior could not act for the President in determining that James Lewis should cease to hold his office, that even if the Secretary could have done so, he did not do so, since he never addressed any communication to James Lewis or issued any order dealing with his *incumbency* of his office, that, under the decision in Truitt v. The United States, discussed on pages 7-8 of this brief, no subordinate of the head of an Executive Department can act for the President even in those cases in which the head of the department can so act, that none, even, of the communications of the Commissioner of the General Land Office to Lewis deal with Lewis' *incumbency* of his office, but all refer only to an intended abolition of the office itself, which neither the Commissioner, nor the Secretary, nor the President himself could ordain, it requiring a statute for its accomplishment, that

though the Commissioner of the General Land Office and the Secretary of the Interior illegally tried to abolish the office of Surveyor General of Louisiana on June 30, 1909, their action in this respect was void and of no effect, and that the office continued to exist until it was abolished, under the statutes governing such cases, on June 30, 1910, one year later, and that, in short, the rule of law invoked by appellees as destructive of appellant's contentions, has no applicability to the facts of the case at bar, nor are any of the cases cited by appellees authorities against appellant on the agreed facts in this case, but, so far as any of them govern the case at bar, they are authorities in support of appellant's position.

But, it is contended by appellees, the President, by his order of January 9, 1915 (Rec., 14), ratified the act of the Secretary of the Interior and the Commissioner of the General Land Office. His letter of attempted ratification, as set out on page 14 of the Record, is as follows:

> "The Secretary of the Interior.
>
> "Sir: The action of the Interior Department in discontinuing the office of the United States surveyor general for the district of Louisiana from and after June 30, 1909, as shown by the letters of the Commissioner of the General Land Office to James Lewis, surveyor general of Louisiana, dated December 5, 1908, and May 11, 1909, and the appointment by the Secretary of the Interior, under date of June 16, 1909, of Arthur Gascon as custodian of the records of the office of the surveyor general of Louisiana, to take effect July 1, 1909, copies of which letter and appointment are hereto attached, is hereby ratified and confirmed.
>
> "Woodrow Wilson, President."

It will at once be seen that this letter is very precise and limited in its terms and confines the ratification strictly to

the action of the Interior Department as set forth in the two letters of the Commissioner and the order of the Secretary specifically mentioned. It will also be noted that this attempted ratification took place five and one-half years after the date on which the United States contends that James Lewis was removed from office, four and one-half years after the date on which appellant contends his office was terminated under R. S. 2218 and 2221, and over one month after the death of James Lewis was suggested to the Court of Claims (Rec., 11), a variety of post-mortem honor worthy of the custom in Japan.

Without renewing discussion of the question of whether or not the recitals of departmental *intention* as to the discontinuance of the office of Surveyor General of Louisiana, contained in said Commissioner's letters of December 5, 1908, and May 11, 1909, and said Secretary's order of appointment of June 16, 1909, could be construed as a formal order of discontinuance, had the power to make such an order resided in any officer of the Government, it is contended by appellant that the ratification of the President, contained in his said letter above referred to, is beyond his authority and power and, therefore, of no effect, for the reason that neither the President himself nor any of his subordinates possessed originally or has ever possessed any authority or power whatsoever to discontinue or abolish the office of Surveyor General of Louisiana.

It is not contended that the President did not have the power to remove James Lewis from office under Sec. 2222, Revised Statutes, but it is contended that the President never did and never has removed him from office under said R. S. 2222, nor do the communications of the Secretary of the Interior or the Commissioner of the General Land Office even purport to remove James Lewis from office, as an examination of the record in this case shows.

All the communications in question, addressed to Lewis by his superior officers, were to the same effect, namely, that his *office*—not his *incumbency* of it—would be discontinued on June 30, 1909, although such a discontinuance of the office was not within the power of the Commissioner, the Secretary, or even the President to ordain.

Appellees attempt to justify and vitalize the President's attempted ratification upon the authority of the case of Heinzen *v.* U. S., 206 U. S., 370 at 382. But that case is not in point, as an analysis of its holding shows. In the Heinzen case, it was held that Congress had the power to adopt and ratify the previously unauthorized act of the President, in levying and collecting duties on imports into the Philippines, because it had the power originally to enact a law authorizing the exaction of such duties. In the case at bar, it is contended by appellant that the President did not have the authority to ratify the attempted discontinuance of James Lewis' office, since he did not have the power originally to discontinue it. In the Heinzen case, the ratification which the Supreme Court held to be legal was made by act of the legislature—by statute—enacted in due time, whereas in the case at bar the attempted ratification is by act of the executive taken out of time. In the Heinzen case, the ratification and legalization of the unauthorized act was effected by the entire law-making machinery of the Government—the two Houses of Congress and the President—working in conjunction in the enactment and approval of a law: in the case at bar, the ratification of the illegal act and its vitalization into a legal one is attempted to be made by a single branch of the law-making machinery of the Government, *i. e.*, the President of the United States, acting alone and in non-conformity with the established provisions of law on the subject. The President's power under the law was only to remove Lewis from office

and thereby terminate his incumbency of his office, but this was not attempted. What the Commissioner of the General Land Office and the Secretary of the Interior attempted was to terminate, although it was created by statute, the office itself of Surveyor General of Louisiana, by discontinuing the same and this neither of them had the power under the law to do. It is this attempted act on their part that the President has essayed to ratify and validate by his letter of January 9, 1915, and, as the President was without the power to do this act, to abolish this statute-created office, at the time his subordinates attempted it, he can not legalize their attempt by ratification. As said by Mr. Justice Day of this Court, in rendering the dissenting opinion in the recent case of The United States *v.* The Midwest Oil Company *et al.*, 236 U. S., 459 at 505, "The Constitution does not confer upon him (the President) any power to enact laws or to suspend or repeal such as Congress enacts. Kendall *v.* United States, 12 Pet., 524, 613."

For the above reasons, it is submitted that the President's ratification, contained in his letter set forth on page 14 of the Record, is inoperative and of no effect.

Reply to Appellees' Third Point.

Appellees' third point is that appellant is not entitled to the fees claimed, because, appellees allege, they were not provided for by statute and were prohibited by Section 1765 of the Revised Statutes.

Appellant has covered these matters fully in her initial brief and here confines herself to inviting the Court's attention anew to the arguments there made upon pages 31 to 43. Appellees' sweeping statement, on page 14 of their brief, to the effect that the act of March 3, 1831, "in particular strikes at the roots of the fee emoluments to the occupant of this office and limits his remuneration to a fixed

salary" must not, however, be permitted to pass unchallenged. The act of March 3, 1831, did not strike at the fee emoluments of the Surveyor General of Louisiana, as is clearly shown on pages 34 to 42 of appellant's brief, and particularly by the acts themselves as they appear in parallel columns on page 39 of that initial brief, and not only do the ordinary principles of statutory construction force this conclusion, but the action of the successive Surveyors General of Louisiana in retaining such fees as their personal property from the date of the creation of the office in 1831 until stopped by the Commissioner of the General Land Office in 1907 and the action of the General Land Office in acquiescing and countenancing such retention throughout all those years confirms it. And to such a situation, R. S. 1765 has no application whatever, as is clearly shown on page 42 of appellant's initial brief.

Respectfully submitted,

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LEWIS, EXECUTRIX OF LEWIS, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 197. Submitted April 23, 1917.—Decided May 21, 1917.

The clause in the Sundry Civil Appropriation Act of March 4, 1909, c. 299, 35 Stat. 945, 987, appropriating money to enable the Secretary of the Interior to complete unfinished work pertaining to surveys in Louisiana and other States "caused by the discontinuance of the offices of surveyors-general in those States," abolished the office of surveyor general in Louisiana, repealing by necessary implication § 2207 of the Revised Statutes creating that office.

In determining the effect of the later enactment it must be assumed that Congress was familiar with action whereby the Interior Department had already undertaken to terminate the office, which the act recognizes as discontinued.

In view of § 1765, Rev. Stats., which fixes the compensation of federal officers at the salaries established by law with only such additional compensation as is by law authorized and explicitly appropriated, the surveyor general of Louisiana was not entitled to the fees for furnishing copies of plats and transcripts of records which the Act of March 3, 1831, § 5, c. 116, 4 Stat. 492, required him to collect but did not undertake to dispose of.

50 Ct. Cls. 226, affirmed.

THIS suit was instituted by James Lewis, and revived upon his death by Josephine B. Lewis, as executrix, to recover the sum of $2,000 salary claimed to be due him from the United States as surveyor general of Louisiana for the fiscal year beginning July 1, 1909, and ending June 30, 1910, and to recover the further sum of $2,287.80 claimed to belong to him as perquisites of this office and paid over his protest into the Treasury of the United States between May 1, 1907, and June 30, 1909, at the direction of his superior officer, the Commissioner of the General Land Office, a total of $4,287.80, for which he prayed judg-

ment. The Court of Claims found for the United States on both items and dismissed claimant's petition (50 Ct. Cls. 226), and it is from this judgment that the appeal has been taken to this court.

From the findings of fact made by the Court of Claims, the following appears: On or about January 18, 1905, James Lewis, who had previously held the office, was reappointed and recommissioned surveyor general of Louisiana, and under this commission he administered the duties of the office continuously until July 15, 1909, on which date he was deprived of the possession and custody of the records and other property of the office by John H. Batchelor, a clerk detailed from the General Land Office of the United States and acting under directions from the Commissioner of the General Land Office, as will hereafter more fully appear.

On December 7, 1908, Lewis received a letter from the Commissioner of the General Land Office dated December 5, 1908, in which the Commissioner informed him that it was proposed to discontinue the office of surveyor general for the district of Louisiana on June 30, 1909, and on or about May 13, 1909, he received a letter from the Commissioner, dated May 11, 1909, reading in part as follows:

"As the office of the surveyor general of Louisiana will be permanently closed and discontinued on July 1, 1909, the records thereof, excepting such as may be required for use in this office, will be turned over to the State of Louisiana when proper provision has been made by the legislature for their safe-keeping and providing for free access to them by the authorities of the United States, as provided by §§ 2218, 2220, and 2221, Revised Statutes.

"As no provision has been made by the legislature for the reception of the records under the conditions above stated, it will become necessary to appoint a custodian of them on July 1, at a salary of $1,000 per annum, who will

retain them in his custody until the required law has been provided. . . ."

On or about June 19, 1909, Lewis received from the Commissioner a letter, as follows:

"As you have been verbally informed that Congress omitted to include an appropriation for the maintenance of your office, you are aware that it will be necessary to discontinue it after June 30 next.

"You are now advised that Mr. John H. Batchelor, of this office, has been detailed to visit your office and supervise the transfer of its records to the State building at Baton Rouge, La.; also to select such of the records and Government property as it is thought best should be moved to this city for use in this office. You are directed to furnish him all facilities for carrying out this purpose and give him such assistance as he may need.

"It is assumed that you have already prepared an inventory of the records and property, which will be verified by Mr. Batchelor.

"The State authorities having failed to provide by legislation for the custody and care of the records which by law are to be turned over to them, it will be necessary, pending the enactment of suitable provision for a place for the records, to give the same in charge of a custodian. Mr. Arthur Gascon, of your office, has been selected for this office, and he will receipt to Mr. Batchelor for the records by schedule.

"Property which is not a part of the records, such as furniture not belonging to the Treasury Department, and stationery, including surveying instruments, drafting instruments, etc., will be examined by Mr. Batchelor, and that which is serviceable and can be transported profitably to this city will be boxed up for transmission. The remainder will be stored and advertised for sale at auction, either under Mr. Gascon or other officer, or turned over to the local land office.

"Mr. Gascon will be instructed separately."

Pursuant to the plan outlined in this letter, on June 19, 1909, Batchelor, a clerk detailed from the General Land Office, acting under instructions from the Commissioner, dated June 17, 1909, arrived at the surveyor general's office in New Orleans, La., and assumed supervision of the closing of that office and the disposition of the records and other property therein, caused inventories of said records and other property to be made, and, on July 15, 1909, the same having been completed, took said records and property out of the possession and custody of Lewis and gave to him a formal receipt therefor. Thereafter, on the same day, Batchelor, acting under his instructions, turned over the records and other property of the office to Arthur Gascon, formerly chief clerk in the office of the surveyor general, as custodian thereof, Gascon having been appointed custodian thereof by the Secretary of the Interior on June 16, 1909, to take effect July 1, 1909, the appointment being in the following language:

"Arthur Gascon, of Louisiana, is hereby appointed custodian of the documents and records pertaining to the office of the surveyor general of Louisiana upon the discontinuance of that office, at a salary of $1,000 per annum, to take effect upon July 1, 1909.

"Salary payable from the appropriation for completing field notes, etc., of surveys in Minnesota, North Dakota, and Louisiana.

"By transfer from chief clerk, office of surveyor general of Louisiana."

On January 9, 1915, the President issued the following order:

"The Secretary of the Interior.

"Sir: The action of the Interior Department in discontinuing the office of the United States surveyor general for the district of Louisiana from and after June 30, 1909, as shown by the letters of the Commissioner of the Gen-

eral Land Office to James Lewis, surveyor general of Louisiana, dated December 5, 1908, and May 11, 1909, and the appointment by the Secretary of the Interior, under date of June 16, 1909, of Arthur Gascon as custodian of the records of the office of the surveyor general of Louisiana, to take effect July 1, 1909, copies of which letters and appointment are hereto attached, is hereby ratified and confirmed.

"WOODROW WILSON, President."

The records of the surveying district of Louisiana were not completed on June 30, 1909, or on July 15, 1909, and the State of Louisiana did not provide by law for the reception and safe-keeping as public records of the field notes, maps, records, and other papers appertaining to land titles in said State, which belonged to the office of United States Surveyor General of Louisiana, and for the free access to the same of the authorities of the United States, until June 10, 1910, on which day the Governor of the State approved an act of the general assembly known as Act No. 6 of the Session Acts of the General Assembly of the State of Louisiana for the year 1910, and passed for that purpose. Acting under authority which was vested in him for that purpose by this act of the General Assembly, Fred J. Grace, register of the state land office of Louisiana, on June 30, 1910, formally receipted to Gascon, custodian as aforesaid for the records of the United States Surveyor General's office of Louisiana, for the plats, field notes, books, papers, etc., constituting the records of said office, and on that day Gascon, for and in behalf of the United States, formally delivered the said records to the State of Louisiana in the person of its duly authorized representative, Fred J. Grace.

For the period beginning July 1, 1909, and ending June 30, 1910, both inclusive, Lewis received no salary or compensation from the United States as surveyor general of Louisiana.

During Lewis' period of service as surveyor general of Louisiana he furnished copies of plats of surveys and transcripts from the records of his office to various individuals requiring them, and asked and received therefor from such individuals fees, as compensation for the service rendered in furnishing such copies and transcripts, in amounts equal to or less than those authorized in said § 5 of the Act of Congress approved March 3, 1831, 4 Stat. 492, entitled "An act to create the office of surveyor of the public lands for the state of Louisiana." Some of such copies and transcripts were certified by him under the seal of his office, and for such certifications he received from the individuals requiring the same fees at the rate of $1 for each certificate and seal. From the time Lewis assumed the authority, powers and duties of his office up to and including April 30, 1907, he retained as his personal property the fees received by him, construing said § 5 of the Act of March 3, 1831, as conferring upon him this right, in addition to and separate from his salary as surveyor general.

From the time the office of surveyor general for Louisiana was established up to the time Lewis last entered upon its duties, the incumbents of the office rendered similar services to individuals and received and retained fees for such services as their personal property, and in this construction of the Act of March 3, 1831, up to and including April 30, 1907, the Commissioner of the General Land Office and the Secretary of the Interior acquiesced.

Upon April 15, 1907, the Commissioner of the General Land Office issued a circular order to Lewis, requiring him to desist from retaining these fees as his personal property, and requiring him, when application should be made by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof at the rates

established by law for registers and receivers for like services, and to require said applicant to deposit the amount indicated in a United States depository to the credit of the Treasurer of the United States, and directing Lewis, after that should have been done, to furnish the copies and transcripts ordered.

Lewis protested against this order in a letter to the Commissioner dated May 3, 1907, in which he informed the Commissioner that his office had hitherto based its charges for copies from its records upon § 5 of the Act of March 3, 1831; that the rates established by law for registers and receivers for furnishing such copies were not applicable to his office; and that the fees for furnishing such copies had been construed by the surveyor general of Louisiana as perquisites allowed to him, as appeared from the correspondence of his office with the General Land Office as far back as 1860. To this letter the Commissioner replied, on May 9, 1907, that the Act of March 3, 1831, being unrepealed, Lewis should continue to charge the fees established under the act, to the extent of which direction the circular order of April 15, 1907, stood modified as far as Lewis' office was concerned, but that all fees of whatever nature received from parties desiring copies of the records must be covered into the Treasury, and the practice of receiving them as personal property be discontinued.

Upon receipt of this letter, Lewis addressed a second letter of protest to the Commissioner. The Commissioner replied, on May 31, 1907, that his order of April 15, 1907, was considered to be in the interest of good administration and must be strictly observed.

Under this order of April 15, 1907, there was deposited in the United States subtreasury at New Orleans, by individuals in payment for copies furnished by the surveyor general's office from May 1, 1907, to June 30, 1909, inclusive, the sum of $635.65.

On October 19, 1907, the Commissioner issued to Lewis

a further circular order relative to these fees, modifying the circular order of April 15, 1907, and requiring him thereafter, when application should be made to him by individuals for exemplified copies of plats or other records in his office, to first furnish the applicant with a memorandum of the exact cost thereof, to require the applicant to pay such cost to him, as surveyor general, and upon receipt of the amount to prepare the copies desired, and to deposit the aggregate amount thus received each week to the credit of the Treasurer of the United States on account of "Receipts for furnishing copies of records," and to forward the duplicate certificates of deposit to the office of said Commissioner in Washington.

Upon receipt of this circular order, Lewis wrote another letter of protest to the Commissioner.

Under the circular order of October 19, 1907, Lewis deposited in the United States subtreasury at New Orleans, to the credit of the Treasurer of the United States, between May 1, 1907, and June 30, 1909, inclusive, the sum of $1,652.15, received by him as fees from individuals.

The sums deposited by individuals or by Lewis, from May 1, 1907, to June 30, 1909, inclusive, aggregate the sum of $2,287.80, no part of which has ever been received by Lewis from the United States.

Mr. L. Russell Alden and *Mr. Edward F. Colladay* for appellant.

Mr. Assistant Attorney General Thompson for the United States.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

Section 2207 of the Revised Statutes provided for the appointment of a surveyor general for the surveying dis-

trict of Louisiana; § 2208 fixed his salary at the sum of $2,000 a year; § 2217 fixed the term of office at four years from the date of the commission unless the incumbent should resign, die or be removed from office within that period.

The claimant insists that Lewis was entitled to the salary of the office for the year ending June 10, 1910, notwithstanding the facts found by the Court of Claims as to the discontinuance of the office, as it was not until that date that the State of Louisiana duly provided for the reception and safe-keeping of the papers and records of the office, which were delivered by the custodian to the State on June 30, 1910.

Sections 2218, 2219, 2221 and 2222 of the Revised Statutes provide as follows:

"2218. The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying-districts for which surveyors-general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such district are completed, the surveyor-general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, or to such other officer as may be authorized to receive them, all the field-notes, maps, records, and other papers appertaining to land titles within the same; and the office of surveyor-general in every such district shall thereafter cease and be discontinued."

"2219. In all cases where, as provided in the preceding section, the field-notes, maps, records, and other papers appertaining to land titles in any State are turned over to the authorities of such State, the same authority, powers, and duties in relation to the survey, resurvey, or subdivision of the lands therein, and all matters and things connected therewith, as previously exercised by the surveyor-general, whose district included such State, shall

be vested in, and devolved upon, the Commissioner of the General Land-Office."

"2221. The field-notes, maps, records, and other papers mentioned in section twenty-two hundred and nineteen, shall in no case be turned over to the authorities of any State, until such State has provided by law for the reception and safe-keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United States."

"2222. Every surveyor-general, register, and receiver, except where the President sees cause otherwise to determine, is authorized to continue in the uninterrupted discharge of his regular official duties, after the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office; and the existing official bond of any officer so acting shall be deemed good and sufficient, and in force, until the date of the approval of a new bond to be given by him, if recommissioned, or otherwise, for the additional time he may so continue officially to act, pursuant to the authority of this section."

It is the contention of the Government that the action of the Secretary of the Interior with the approval of the President had the effect to discontinue the office as of July 1, 1909, and that in fact the office of surveyor general was discontinued after June 30, 1909. In the Sundry Civil Appropriation Act of March 4, 1909, 35 Stat. 945, 987, it was provided:

"To enable the Secretary of the Interior to complete the unfinished drafting and field-note writing pertaining to surveys in the States of Minnesota, North Dakota, and Louisiana, caused by the discontinuance of the offices of surveyors-general in those States, six thousand and five hundred dollars."

And in the appropriation bill for that year Congress

made no provision, such as had been customary in former years, for salaries of these officials.

The Court of Claims held that this act was effectual to abolish the office of surveyor general for Louisiana. We deem that a correct conclusion. It is true that repeals by implication are not favored. The repugnancy between the later act upon the same subject and the former legislation must be such that the first act cannot stand and be capable of execution consistently with the terms of the later enactment. As we view it, such conflict does appear in this instance.

It must be assumed that Congress was familiar with the action of the executive department undertaking to terminate the office, and when Congress acted upon the assumption that the office was abolished and provided for the unfinished work pertaining to the surveys, "caused by the discontinuance" of the office, such action was tantamount to a direct repeal of the act creating the office and had the effect to abolish it.

As to the part of Lewis' claim which is for fees, it is alleged in his petition, and found to be a fact by the Court of Claims, that during the entire period of his service as surveyor general he furnished copies of plats of surveys and transcripts from the records of his office to various individuals requiring them, receiving therefor compensation as authorized by § 5 of the Act of Congress of March 3, 1831, 4 Stat. 492, which is as follows:

"The surveyor general . . . shall be allowed an annual salary of two thousand dollars . . . and that the fees heretofore authorized by law for examining and recording surveys be, and the same are hereby, abolished; . . . and for every copy of a plat of survey, there shall be paid twenty-five cents, and for any transcript from the records of said office, there shall be paid at the rate of twenty-five cents for every hundred words by the individuals requiring the same."

It had been the custom of Lewis and his predecessors in office to retain these fees as their personal property, but by virtue of an order from the Commissioner of the General Land Office, the amounts realized from these fees between May 1, 1907, and June 30, 1909, being $2,287.80, were paid into the Treasury of the United States. It is appellant's contention that this amount is now due and owing Lewis' estate, under the terms of § 5 of the Act of March 3, 1831, above quoted, interpreted in the light of established custom.

Section 1765 of the Revised Statutes provides:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation." Claimant contends that this section shows no intention to interfere with the enjoyment of any emoluments already fixed by law, as the additional compensation, the receipt of which it prohibits, is compensation additional to "salary, pay, or emoluments . . . fixed by law or regulations." To establish that these fees were emoluments fixed by law, the claimant points to the Act of April 21, 1806, 2 Stat. 391, by § 9 of which it is provided: "The surveyor of the public lands, south of Tennessee, be, and he is hereby directed to appoint a principal deputy for each of the two land districts of the territory of Orleans . . . And each of the said principal deputies shall receive an annual compensation of five hundred dollars, and in addition thereto, the following fees, that is to say: for examining and recording the surveys executed by any of the deputies, at the rate of twenty-five cents for every mile of the boundary line of

such survey; and for a certified copy of any plot of a survey in the office, twenty-five cents."

This read in connection with the Act of March 3, 1831, is the foundation of this claim. The Act of 1831 provides that the surveyor general of the State of Louisiana shall have the same authority, and perform the same duties, as are vested in and required of the surveyor of the lands of the United States, south of the State of Tennessee, or of the principal deputy surveyors in the said State.

We are of opinion that § 1765 of the Revised Statutes, above quoted, prevents the allowance of the claim for fees. This section is general in its application, and fixes the compensation of officers of the United States at the salary established by law, unless the additional compensation is authorized and explicitly appropriated for. No such law or appropriation is shown in this case. The Act of March 3, 1831, made no disposition of the fees. After May, 1907, the Department required them to be paid into the Treasury. The Court of Claims correctly ruled that § 1765 controlled this part of the claim of appellant.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.